

(25,894)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 471.

RUST LAND AND LUMBER COMPANY, PLAINTIFF IN
ERROR,

vs.

ED. JACKSON, WILL SCOTT, J. F. NICHOLS, A. C. COLEMAN,
ZANDERS PARKER, AND ISOM WHITE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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Corrected Judgment

201

a

Caption.

#140.

EDD JACKSON et al., Plaintiffs,

vs.

RUST LAND & LUMBER COMPANY, Defendants.

Appeal from the Circuit Court, First Judicial District of Coahoma County, State of Mississippi, December Term, 1913.

Hon. T. B. Watkins, Judge.

Judgment against defendants for \$3,600.00 and all costs.

1

Caption of the Court.

Be it remembered that on this the 1st day of December, 1913, the same being the first Monday in said month, the Honorable Circuit Court for the First Judicial District of Coahoma County, State of Mississippi, convened according to law in the courthouse in the town of Friars Point, said District, County and State aforesaid.

Present and presiding, the Honorable T. B. Watkins, Judge; W. A. Alcorn, Jr., District Attorney; H. E. Howell, Court Stenographer; J. E. Montroy, Clerk, and W. H. Fitzgerald, Jr., Sheriff.

When and where the following proceedings were had and done, to-wit:

2

Affidavit in Replevin.

STATE OF MISSISSIPPI,

County of Coahoma:

Before me, J. E. Montroy, Clerk of the Circuit Court in and for the County and State aforesaid, Gerald Fitzgerald, agent and attorney for Edd Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Sanders Parker, Isom White, who makes affidavit that six hundred (600) logs, aggregating three hundred and sixty thousand (360,000) feet of timber, all cottonwood timber, of the value of about six dollars (\$6.00) per log, or ten dollars (\$10.00) per thousand feet of timber the property of affiant's principals, was wrongfully taken within the past thirty days from affiant's principals and is now wrongfully detained by the Rust Land & Lumber Company, a foreign corporation, by their agents and attorneys and laborers, whose names are unknown to affiant, except that affiant learns that one Mr. Deshea has charge of said laborers, said timber is now situated on accretions to

Section 11, Township 28, Range 5 West, in Coahoma County, Mississippi, that affiant's principals are legally entitled to the immediate possession thereof;

Wherefore affiant prays for his principals a writ of replevin for the seizure of said property.

GERALD FITZGERALD,
Agent and Attorney for Plaintiffs.

Sworn to and subscribed before me, this the 22d day of January, A. D. 1913.

J. E. MONTROY,
Clerk of the Circuit Court.

Filed this 22d day of January, 1913.

J. E. MONTROY, *Clerk.*

3

Writ of Replevin.

The State of Mississippi to the sheriff or any lawful officer of Coahoma County in said State:

You are hereby commanded to take six hundred (600) logs, aggregating three hundred and sixty thousand (360,000) feet of cottonwood timber, of the value of about six (\$6.00) per log, or ten (\$10) dollars per thousand feet, now situated on accretions to Section 11, Township 28, Range 5 West, Coahoma County, Mississippi, of the aggregate value of \$3,600.00 as described in plaintiff's affidavit alleged by Gerald Fitzgerald, agent and attorney for Edd Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker, Isom White, the plaintiffs, to be wrongfully detained by the Rust Land & Lumber Company, a foreign corporation, the defendant, in said County, and to deal therewith according to law; and to summon the defendant to appear before the Circuit Court of the County of Coahoma, in the State aforesaid, at a term thereof to be held at the courthouse in the town of Friars Point, Miss., in said County and State, on the third Monday of April, A. D. 1913, to answer the action of replevin by said the plaintiffs for the unlawful detention of said property..

Given under my hand and official seal, and issued this the 22d day of January, A. D. 1913.

J. E. MONTROY,
Circuit Clerk, Coahoma County, Mississippi.

4

Sheriff's Return on Writ of Replevin.

Executed the within writ of replevin by levying on and taking into my possession a certain lot of cottonwood logs in the raft and floating on a body of water commonly known as Old River near Stovalls & Sons West End Plantation, in Coahoma County, State of

Mississippi, there being 562 logs by actual count estimated to contain about 3,600 feet of timber of the value of \$10.00 per thousand being a total value of \$3,600.00.

The above property being levied on as the property of the within named plaintiff's Edd Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isom White.

This 8th day of February, 1913.

W. H. FITZGERALD, JR., *Sheriff*,
By N. A. CARTLEDGE, D. C.

Sheriff's Fees:

Ex.	\$2.00
Counting Logs	\$3.00
Serving Sums	\$2.00
	<hr/>
	\$7.00

Returned and filed this the 10th day of February, 1913.

J. E. MONTROY, *Clerk*.

5

Defendant's Replevin Bond.

STATE OF MISSISSIPPI,
County of Coahoma:

Be it known, that we, Rust Land & Lumber Company, principal, and United States Fidelity & Guaranty Co. of Baltimore, Md., Sureties, agree and bind ourselves to pay Edd Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isom White, Plaintiffs, the sum of \$7,200.00 unless the said principal obligor and defendant shall have certain personal property, to-wit: 562 logs of cottonwood timber, aggregating 360,000 feet of the value of about \$6.00 per log or \$10.00 per 1,000 feet, before the Circuit Court of Coahoma County, to be held at Friars Point, Mississippi, on the third Monday of April, 1913, to satisfy the judgment of said court in an action of replevin by said plaintiffs against said defendant for said property.

Witness our signatures, this 10th day of February, 1913.

RUST LAND & LUMBER COMPANY,

By F. A. MONTGOMERY,

Ag't and Attorney.

UNITED STATES FIDELITY & GUARANTY
CO., OF BALTIMORE, MD.,

By J. O. LAMPKIN, *Agent*.

I approve the above bond this the 10th day of February, 1913.

W. H. FITZGERALD, JR.,

Sheriff of Coahoma County,

By W. N. PALMORE, D. C.

Filed 10th day of February, 1913.

J. E. MONTROY, *Clerk*,

By J. R. ALCORN, D. C.

Declaration.

STATE OF MISSISSIPPI,
County of Coahoma:

In the Circuit Court, First Court District, April Term, 1913.

#140.

EDD JACKSON et al., Plaintiffs,

vs.

RUST LAND & LUMBER COMPANY, Defendants.

Come Edd Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isom White, and complain of the Rust Land & Lumber Company, a corporation organized under the laws of the State of Wisconsin, with its domicile at — in said State, in an action of repleving for that, whereas, heretofore, to-wit: On or about January 21st, 1913, the said defendant wrongfully seized and took from the possession of plaintiffs, without authority of law or right, certain personal property, to-wit: 600 cottonwood logs, averaging about 600 feet to the log, aggregating 350,000 feet of timber, the said logs being of the value of about \$6.00 each, on an average, and the said timber being of the value of \$10.00 per 1,000 feet, and still wrongfully detains said property.

Plaintiffs aver that they are entitled to recover the said property and also to recover of the defendant the sum of \$2,000.00 damages for the said wrongful taking thereof;

Wherefore plaintiffs sue and demand judgment for the said value of said timber, to-wit: \$3,600.00 and said damages, to-wit: \$2,000.00 and all costs of suit in this behalf.

MAYNARD & FITZGERALD,
Attorneys for Plaintiffs.

Filed 15th day of March, 1913.

J. E. MONTROY, *Clerk,*
By J. R. ALCORN, *D. C.*

7

Plea.

STATE OF MISSISSIPPI,
Coahoma County:

In the Circuit Court, December Term, 1913.

#140.

EDD JACKSON et al.

vs.

RUST LAND & LUMBER COMPANY.

Now comes the said defendant, the Rust Land & Lumber Company, and for plea to the declaration filed against it herein, says that it is not guilty of the wrongs and injuries whereof the said plaintiff has in their said declaration herein complained against it, nor of any of them, and of this, the said defendant, puts itself upon the Country.

WILSON & ARMSTRONG,
MONTGOMERY & MONTGOMERY,
Att'ys for Defendant.

Filed December 1st, 1913.

J. E. MONTROY, *Clerk*,
By J. R. ALCORN, *D. C.*

7½

Circuit Court, First District.

STATE OF MISSISSIPPI,
Coahoma County:

#140.

EDD JACKSON et al., Plaintiffs,

vs.

RUST LAND & LUMBER COMPANY, Defendant.

It appearing to the attorneys for both the plaintiff and defendant, in the above styled cause, that there are certain maps now on file in the Circuit Court, which were introduced in evidence, in the above styled cause, and that it will be almost impossible for the Circuit Clerk, in making up the record for the Supreme Court, to get correct copies made, to scale, so that they will be understandable in the Supreme Court, and it appearing that the only feasible plan to have the said maps in the Supreme Court would be to allow the originals to be sent down with the record by the clerk, and to be

used in the Supreme Court, as though copies had been made, it is therefore hereby agreed, by and between all parties to this suit, both the plaintiff and defendant, that the following original maps, introduced in the trial of the above styled cause, may be sent down by the Clerk of the Circuit Court, with his record, of the above styled cause, to the Supreme Court of the State of Mississippi, and that the maps there may be received and accepted as though copies had been made, and all matters of formality, in the lack of copies, are hereby waived, to-wit;

Map of Township 28, Range 4 West, State of Mississippi, being Exhibit No. —.

Map of Township 28, Range 5 West, State of Mississippi, being Exhibit No. —.

Map of Township 4, South, Range 4 East, State of Arkansas, being Exhibit No. 23.

Map of Township 29, Range 4 West, State of Mississippi, 7¾ being Exhibit No. 24.

Map of Township 29, Range 5 West, State of Mississippi, being Exhibit No. 25.

Map of Township 28, Range 4 West, State of Mississippi, being Exhibit No. 26.

And also a certain map drawn by L. W. Mashburn, Engineer, being exhibit No. — to the stenographer's notes.

Witness the hands of the attorneys for both plaintiffs and defendants, this the 31st day of August, 1914.

MONTGOMERY & MONTGOMERY,

Of Counsel for Rust Land & L'b'r Co.

MAYNARD & FITZGERALD,

Attorneys for Plaintiffs.

Endorsed on the back of said agreement is the filing thereof, which said filing is in words and figures as follows, to-wit;

Filed October 14th, 1914.

J. E. MONTROY, *Clerk.*

8

EXHIBIT NO. 1 TO PLAINTIFF'S TESTIMONY.

STATE OF MISSISSIPPI,

County of Coahoma:

In the Circuit Court, First District, December Term, 1913.

#140.

EDD JACKSON et al.

VS.

RUST LAND & LUMBER COMPANY.

In order to expedite the trial of the above styled cause and prevent further expense in regard to the producing of certified copies of

deeds, etc., it is hereby agreed by and between the attorneys for the plaintiffs and the attorneys for the defendant that the title in fee simple to lots 1 to 9 inclusive, of Section 11, Township 28, Range 5 West, in the County of Coahoma, *County* and State of Mississippi, is vested in Charles McGee, King & Anderson, Joe Williams, and Ellen Jackson, and that the plaintiffs herein had the right and authority from said owners to cut the standing timber on said lots within the calls of said owners' deeds.

And it is further agreed that the title in fee simple to Section 22 and Section 23, all in Township 4, South Range 4 East, in Phillips County, Arkansas, is vested in the Rust Land & Lumber Company, Defendants in this cause. It is further agreed by and between the attorneys for both complainants and defendants that this agreement may be introduced in evidence and used in the trial of said cause as evidence in lieu of the original deeds of conveyances and in place instead thereof, and shall constitute valid title in the aforesaid owners to the lands as above described.

Signed by attorneys for both plaintiffs and defendants, this the 29th day of November 1913.

MAYNARD & FITZGERALD,

Att'ys for Plaintiffs.

WILSON & ARMSTRONG,

MONTGOMERY & MONTGOMERY,

Att'ys for Defendant.

Filed December 1st, 1913. J. E. Montroy, Clerk.

9 STATE OF MISSISSIPPI,
Coahoma County:

In Circuit Court, December Term, A. D. 1913, First District.

EDD JACKSON et al.

vs.

RUST LAND & LUMBER COMPANY.

Upon the trial of the above entitled cause, the following evidence was introduced and proceedings had, to-wit:

ZANDERS PARKER, a witness introduced for and on behalf of the plaintiff, having been first duly sworn, testified as follows, to-wit:

Q. Where do you live Zanders?

A. I live down on Mr. Williams' place.

Q. How long have you lived down there?

A. I have been there for 19 years.

Q. You are the plaintiff here in this suit against the Rust Land & Lumber Company for the unlawful taking of some logs from you and your co-plaintiffs by the Rust Land & Lumber Company?

A. Yes sir.

Q. Just tell the jury there now, do, or did you cut those logs, did you and your co-plaintiffs cut those logs?

A. Yes sir.

Q. Where did you cut them?

A. We cut them logs down the levy and Dustin Pond.

Q. Under what right did you cut them?

A. Had a written contract.

Q. From whom?

A. Mr. Anderson, Ellen Jackson and Joe Williams.

Q. Who were they, what lands did they own?

A. They owned this portion of it, they owned up here in Section 11.

10 Q. Now on this land, how long have you been knowing this land on which you cut this timber?

A. Seventeen years.

Q. Who has been in actual occupation of that land during all of that time claiming it as theirs?

A. Same parties claiming it now.

Q. That you bought the timber from?

A. Yes sir.

Q. Did you ever know it to be disputed by any one at all?

Defendant objects.

Q. What, if any, dispute about it, did you ever hear?

A. No sir, none at all.

Q. Who claimed to own that land to you there at that time, adversely to the world?

A. King and Anderson, Ellen Jackson and Joe Williams.

Q. The parties you bought the timber from?

A. Yes sir.

Q. Where did they direct you?

A. Across the levy between Pecan Lake and Dustin Pond.

Q. Is that where you cut it?

A. Yes sir.

Q. How long were you in cutting that timber?

A. Near about three weeks.

Q. Were you ever disturbed in the cutting of it?

A. No sir, not until the——

Q. Just before the filing of this suit?

A. Yes sir the time the sheriff of Helena——

Q. Where were you when you saw him?

A. I was home on the South side of the levy.

Q. On the Mississippi side of the levy?

A. On this side of the levy, yes sir.

Q. What did they say to you when they came in?

A. They scame down there, Mr. De Sha——

Q. Who is he?

11 A. He left here a few minutes ago, he — supposed to be representing the Rust Land & Lumber Company.

Q. Tell what he told you then?

A. He came and brought warrants from Phillips County, Arkan-

sas, and when he came, he told us that if we would give the timber up, or else come on with them; of course when he came and brought the high sheriff, rather than go with them, they taken it way from us.

Q. What did you do then?

A. We went to work and hired to Mr. De Sha.

Q. At whose advice?

A. Lawyer Fitzgerald, your advice.

Q. What, if anything, did you do at that time towards getting out writs of replevin for the timber?

A. Well, we applied to you.

Q. To get the writs out?

A. Yes sir, the writs.

Q. Of replevin for the logs?

A. Yes sir.

Q. Did you willingly give up this timber to them?

A. No sir.

Defendant objects.

Court sustains the objection.

Plaintiff excepts.

Q. In what way did they take it from you, by force or not?

A. By force, we wasn't willing to give it up; come there with the high sheriff from Phillips County; we were satisfied we were right, but when the high sheriff come, couldn't help it, said it would be *in* compelled to give it up when the high sheriff come, he come and took it away from us.

Q. You say he did have a warrant for you?

A. Yes sir, for all of us.

Q. Said he did, did he?

A. I saw it.

12 Q. Among the owners that you failed to mention a while ago in that section was Charley McGhee? Does he own a piece?

A. Yes, sir, he is connected with them, too.

Q. Do those parties own all of Section 11 and the accretions?
(No answer.)

Cross-examination:

Q. What is your name?

A. Zanders Parker.

Q. You have a contract for the timber yourself?

A. Yes sir.

Q. Where is your contract?

A. Well, I thought I left it in lawyer Fitzgerald's office, but he say I didn't leave it there, and I couldn't tell you just exactly where it is.

Q. With whom did you contract?

A. Isom White, he is the head contractor, he contracted with Mr. Anderson for the timber.

Q. Well now, did you cut all of the timber yourself, or did you and these other plaintiffs all own it jointly?

A. It was kind of a joint thing.

Q. What?

A. Kind of jointly.

Q. You all had a written contract with the owners?

A. Yes sir.

Q. And you jointly owned it, you and these other plaintiffs?

A. How's that?

Q. You all jointly owned the timber; an enterprise jointly entered into by all of you?

A. Yes sir, but there was only three men in the time of the whole thing, Isom White, Jeff Nichols and Scott.

Q. What interest did you have in the timber yourself?

A. Isom White taken me in there with him, an interest.

Q. You had an interest with Isom?

A. Yes sir.

Q. That was under a contract between you and Isom?

A. Contract between I and Isom.

Q. Yes?

13 A. Yes sir, but my named showed up in this contract.

Q. Now, where was this timber cut?

A. Where was the timber cut?

Q. With reference to the body of water between the island and the Mississippi shore?

A. Where was it cut?

Q. Yes?

A. It was cut between Pecan Lake and Dustin Pond.

Q. What do you call Pecan Lake?

A. There is some people call it Old River, it is Pecan Lake.

Q. That what you call Old River?

A. Some people do.

Q. That's right along the present high bank of the river isn't it?

A. No sir,—there is a levy along the east side of that lake.

Q. Levy along the south side of the lake, and how is the bank of that lake, the south bank very high bank?

A. Might be in some places, but less in some places, and some places a little steep.

Q. That lake you call Pecan Lake is in the shape of a horse shoe isn't it?

A. Yes, great big lake in the shape of a horse shoe, seven or eight hundred feet wide, something like that. Well sir, I suppose it is that wide.

Q. That is your best judgment seven or eight hundred feet wide?

A. Yes sir.

Q. What is the length of it?

A. I don't know sir.

Q. Several miles long isn't it?

A. No sir, I don't know as it is several miles long.

Q. Two or three miles isn't it?

A. It may be.

Q. It is all of the way from eight to twenty feet deep, isn't it?

A. I don't know sir, how deep it is.

14 Q. You never did measure the depth of it?

A. No sir.

Q. And that's the only water between you and what they call Horse Shoe Island, isn't it? Between the Mississippi shore and what they call Horse Shoe Island, that's the only water between the levy and the island?

A. Between the levy and the Horse Shoe Island.

Q. Yes.

A. No sir, Dustin Pond.

Q. This Dustin Pond, that is just a little body of water after the sand bar?

A. It is supposed to be the old river.

Q. You are just supposing about whether it is the old river?

A. I say, it is supposed to be.

Q. How far is Dustin Pond, how far from the levy?

A. About a half a mile.

Q. That runs in a lake too, you speak of?

A. Not necessarily.

Q. The timber doesn't run in this lake at all?

A. No sir.

Q. Doesn't run into anything, just starts out with no outlet?

A. In time of high water.

Q. In low water, there is no outlet at all?

A. No sir, it don't run.

Q. Not in low water?

A. No sir.

Q. Was the timber you cut between that pond and the lake you spoke of?

A. Yes sir.

Q. What sort of timber was growing in there?

A. What sort?

Q. Yes?

A. We cut cottonwood.

Q. How far from the big Lake was the timber when you cut it?

15 A. We started on Pecan Lake bank.

Q. The timber on Pecan Lake, was that as high as the timber was further north from there, larger timber, or smaller as you went north?

A. No sir, about an average thing.

Q. What I am trying to get at whether the timber on the bank of this big lake, was or not smaller than the timber over further?

A. No sir, about one average thing from this lake, Dustin Pond, the timber there about the same, but when you cross this little Dustin Pond, the timber get heavier going north.

Q. After you get across?

A. I say after you cross there.

Q. The timber is still heavier on the north side of Dustin Pond?

A. Yes sir.

Q. You know where the main old island is?

A. Yes sir, I know what is called the Island.

Q. You know where the Mississippi River is?

A. Yes sir.

Q. How far is the river from the levy?

A. I don't know sir, I suppose, to be about three miles, I don't know exactly.

Q. You don't know where the original Arkansas side is do you?

A. I know where I was always told it is.

Q. How long have you lived down there in that neighborhood?

A. About 19 years.

Q. Now, you were north of this lake when,—who was it, came,—

Mr. De Sha came there with an officer?

A. Mr. De Sha.

Q. When he came there with an officer, you were north of that lake?

A. Yes sir on this side of the levy.

Q. On the outside of the levy?

A. Yes sir.

Q. Between the levy and the river?

A. No sir, on this side of the levy.

Q. You cut the timber outside of the levy?

16 A. We cut the timber inside of the levy.

Q. What do you mean by inside?

A. Between the two levies, between the two States levies, I called that inside of the levy.

Q. Two levies?

A. One here and one in Arkansas, that's between the two levies.

Q. You mean between the Arkansas and the Mississippi levy is where you cut the timber?

A. I mean between the two levies, where we cut the timber, we cut the timber between Dustin Pond and Pecan Lake.

Q. After the levy was still further south than Pecan Lake, Mississippi levy?

A. Still further south, well the Mississippi levy run right down opposite of Pecan Lake.

Q. What I want to get at is, the timber was between the Mississippi River and the Mississippi levy when you cut it?

A. Well, it was between where the river is now.

Q. That's what I am talking about, between where the river is now and the Mississippi levy?

A. Yes sir, we cut it between Pecan Lake and Dustin Pond.

Q. It was there that these gentlemen came to you?

A. They came to me on this side of the levy, over home there where I live at.

Q. Where was this timber then?

A. Where we cut it?

Q. You were not there where the timber was when they came to you?

A. No sir.

Q. And who was it *became* besides Mr. De Sha?

A. Mr. De Sha, I don't know the sheriff's name, but his name was on them writs they brought.

Q. Somebody representing himself as the high sheriff of De Sha County?

A. No sir, I di-n't say of De Sha County.

Q. How did you know?

A. He said he was high sheriff, and had his name on the warrants high Sheriff.

17 Q. How do you know?

A. I read it.

Q. What did the warrant say?

A. I couldn't recall to remembrance right now what it did say, but I know it forbids us for cutting any more timber over there under his name.

Q. And this high Sheriff showed you that writ, did he?

A. Yes sir.

Q. Give you a copy of it?

A. A copy of it.

Q. Yes.

A. It was a piece of paper was typed off by the type whoever was—

Q. Where is the paper that he gave you?

A. In lawyer Fitzgerald's office, I reckon, if they ain't there, Joe Nichols got it, I reckon, but I think they are in lawyer Fitzgerald's office.

Q. And this man that said he was the high sheriff had a writ commanding you not to cut any more timber over there, that right?

A. Yes sir, said if we cut any more over there, either remove that what we already cut, he would put us in jail.

Q. Well, now then, did the high sheriff tell you to turn that timber over to Mr. De Sha?

A. Yes sir, he was ready to say, if Mr. De Sha said so, for Mr. De Sha said if we took the timber, we could just go.

Q. Did you turn it over to Mr. De Sha?

A. Yes sir, we didn't bother it anymore.

Q. Did he pay you anything for cutting it?

A. No sir.

Q. What sort of an agreement did you make with him about rafting it you and these other parties?

A. We were to put it out to the lake and raft it for a dollar a thousand.

Q. Out into the river for a dollar a thousand?

A. Into the lake.

18 Q. Well, was the water up then, or low water stage then?

A. When.

Q. When this conversation occurred?

A. Well, the water was just rising, coming in there then.

Q. Hadn't gotten over to where the timber was cut?

A. It had reached some of it.

Q. And you and all of these other plaintiffs contracted with them to raft it into the lake, to put it into the lake in a raft for a dollar a thousand?

A. Yes sir.

Q. And was that contract in writing or verbal?

A. Verbal.

Q. And then you proceeded to do that, didn't you?

A. Yes sir.

Q. You remember the day of this conversation?

A. Do I remember the date?

Q. Yes?

A. No sir, not exactly.

Q. Well, how long was it before you brought this suit?

A. Just as soon as Mr. De Sha come with the high sheriff of Phillips County and demanded us not to bother the timber any more he would put us in jail, we went straight away.

Q. How long was that before you brought this suit, how long after that conversation before this suit was brought?

A. Before it was put in?

Q. Yes?

A. Right away next day.

Q. You already had put the timber into a raft when you brought the suit hadn't you?

A. No sir.

Q. Hadn't done anything at all about rafting it?

A. No sir, we were just preparing to go with them then.

Q. After these gentlemen had had this conversation with you, how long was it before you brought suit, you brought suit for the possession of the timber?

A. They came like today and went straight away next day and put the case into lawyer Fitzgerald.

19 Q. I understand but you didn't bring this suit the next day?

A. The suit?

Q. How long did you work on getting the timber ready for rafting after that conversation?

A. Oh, whenever Mr. De Sha come there, and we commenced to rafting as soon as we commenced floating.

Q. How long after that, how long did you work on it getting it rafted and getting ready to be rafted and everything?

A. Wasn't no getting ready to it.

Q. How long did you work on it before you brought this replevin suit?

A. I didn't work at it any more, when the sheriff come from Helena demanded us to quit, we went straight away then to put the suit in lawyer Fitzgerald.

Q. After you reported the matter to Mr. Fitzgerald, you still went and worked on the timber?

A. We hired to him, yes, sir.

Q. How long did you work on it then?

A. I don't know exactly how long it was, just to the spot.

Q. Well, was it a month?

A. Just about a month, I suppose.

Q. You worked on it then after that for about a month rafting it and getting it ready to be rafted before the writ of replevin was levied on the timber, didn't you?

A. Yes, sir.

Q. And where was the timber when this writ of replevin was *was* levied on it, it was in the lake wasn't it?

A. On this bank of Pecan Lake.

Q. On Pecan Lake on this Mississippi bank?

A. Larger portion of it, few logs.

Q. Was it in the shape of a raft?

A. Yes, sir, cribbed up and boxed.

Q. And to carry out all of the contract with Mr. De Sha, all you contracted to do for a dollar a thousand was to carry it back down Pecan Lake, into the high water into the river.

A. We were to put it into the lake.

Q. You were not to carry it to the river?

20 A. No, sir, not for a dollar a thousand.

Q. Had you about carried out your contract with him when the writ was levied by you?

A. Yes, sir, mighty near it.

Q. And you had it floating on the Mississippi bank into Pecan Lake?

A. Yes, sir, on this bank, yes, sir, Mississippi bank.

Q. This Pecan Lake, is it sometimes called Horse Shoe Lake too?

A. I never know it to be called Horse Shoe Lake.

Q. Sometimes called Old River though isn't it?

A. Some people might, some people.

Q. Don't nearly everybody down there call it Old River?

A. Portion of them, no, sir, portion of them.

Q. Well, you know where Section 10 is?

A. Section 10?

Q. Yes?

A. Yes, sir.

Q. That is on the north side, north of Pecan Lake, isn't it?

A. North?

Q. Yes?

A. No, sir, Section 10 isn't north of Pecan Lake, Section is south of Pecan Lake.

Q. Do you know what the number of the Sections are that Mr. Anderson and these people sold you the timber on?

A. Section 11.

Q. What part of Section 11?

A. What part of Section 11?

Q. Yes, do you know?

A. Say what part of Section 11?

Q. Yes?

A. All I know, it is just Section 11, all I know, Judge.

Redirect examination :

Q. I will ask you to point out on this map, taking the map to be correct, if it looks correct to you, where you cut that timber?

Defendants objects as original.

21 (The Court :) I overrule the objection.

Defendant excepts.

Q. Where did you cut the timber?

A. I cut it right there, right in there.

Q. Cut it,—just make a mark there with a pencil where you cut it?

A. Cut it right in here.

Q. Now, you say, Zanders, that you went back and helped to raft this timber?

A. Yes, sir.

Q. On whose advice did you do that?

A. On your advice.

Recross-examination :

Q. Now you explained all of this circumstance to your lawyer, Mr. Fitzgerald before you went back and did this work, did you?

A. Yes, sir, I, after the case was turned in here.

Q. You explained it all to him, and by his advice, you went back and did this work?

A. Yes, sir.

Q. Now, this lasted, you say, about a month?

A. Yes, sir.

Q. Now, the timber was cut north of Pecan Lake, that is north, is it?

A. North,—yes, sir, of Pecan Lake.

Q. Now, the levy runs on the south side of Pecan Lake, very close to it, doesn't it?

A. Yes, sir.

(Fitzgerald :) The high water was coming up very rapidly, then, wasn't it?

A. Yes, sir.

ISOM WHITE, a witness introduced for and on behalf of the plaintiff, having been first duly sworn, testified as follows, to-wit:

Q. This is Isom White is it?

A. Yes, sir.

22 Q. Where do you live? .

A. Live on the west end of Stovall, just opposite west of Stovall Plantation.

Q. Do you know Section 11, Township 28, Range 5 West in Coahoma County, Mississippi?

A. Yes, sir.

Q. Who is it owned by?

A. Joe Williams, Charlie McGhee, King and Anderson, and Ellen Jackson.

Q. From whom did you buy certain timber down there and cut it between Dustin Pond and Pecan Lake?

A. Bought it from Joe Williams, King and Anderson, Ellen Jackson and Charlie McGhee.

Q. Did you cut that timber down there yourself?

A. Yes, sir.

Q. Do you know Zanders Parker?

A. Yes, sir.

Q. What, if any, interest did he have in the timber?

A. Half interest.

Q. What did these other boys, the plaintiffs in this suit, what interest did they have in the timber?

A. Half interest.

Q. You all interested together equally?

A. Yes, sir.

Q. Who pointed out the place for you where you should go and cut this timber?

A. King and Anderson, Ellen Jackson, and Jo and Henry Williams.

Q. Did they authorize you to go and cut it?

A. Yes, sir.

Q. Where you cut this timber, you had been in notorious, adverse and uninterrupted possession of this land where you cut this timber for about ten years past?

Defendant objects to that, because it is a conclusion.

(The Court:) I overrule the objection.

Defendant excepts.

Q. Who has been in the possession of this land?

23 A. Charlie McGhee and Joe Williams.

Q. Claiming it as their own?

A. Yes, sir.

Defendant objects to that.

(The Court:) I sustain the objection.

Plaintiff excepts.

Q. Well now, what acts of possession, if any——

(Montgomery:) I move to exclude the last question and answer, "claiming it as their own."

(The Court:) I sustain the motion; gentlemen, you will not consider the answer to that question.

Plaintiff excepts.

Q. What, if any, acts of possession, Isom did Charlie McGhee, King and Anderson, and Ellen Jackson and Joe Williams, the owners in Section 11, with whom you had a contract to cut this timber, exercise over this land where you cut this timber?

A. They had claimed it for twelve years to my knowledge?

Q. What had they done in there, if anything?

A. Yes, sir, got them some fire wood off of there.

Q. What else?

A. That's all.

Q. Had they sold any timber in there that you know of?

A. Yes, sir.

Q. They had sold timber?

A. Charlie McGhee had sold some.

Q. Who did he sell it to?

A. Mr. Hull.

Q. How long ago has that been?

A. It's been about twelve years.

Q. Has Charlie and the rest of them been in possession there since then?

A. Yes, sir.

Q. Do those parties that you named own all of Section 11?

A. Yes, sir.

(Montgomery:) We object to that, because it isn't a competent way to prove ownership.

24 (The Court:) I sustain the objection.

Plaintiff excepts.

Q. Isom, how many logs did you and your co-plaintiffs here cut there?

A. About 565.

Q. How many thousand feet of timber was in those logs?

A. About 365,000.

Q. Did you scale them up?

A. Yes, sir.

Q. How many was in it?

A. About 365.

Q. 365,000?

A. Yes, sir.

Q. 365?

A. Yes, sir.

Q. What was the value of that timber cut down there, that 365,000 feet, what was the actual cash market value of the timber there?

A. Cash market value been about seven——

(Montgomery:) We object unless the witness tells what he knows about it.

(The Court:) I sustain the objection.

Plaintiff excepts.

Q. Did you know the value of the timber?

A. Yes, sir, been about \$7,000.00.

Q. Did you know the value of timber, generally, at that time?

A. Yes, sir.

Q. Situated that way?

A. Yes, sir.

Q. What was the value of that timber?

A. Value of that timber was about——

Q. How much a thousand?

A. The value of it was \$10 a thousand.

Q. In the condition it then was?

A. Yes, sir.

25 Q. Now, after you had cut it down, what was the value of it per thousand stumpage, if you know?

A. \$3.50.

Q. Isom, how much did it cost to cut down and put in the condition it is in, this 365,000 feet of timber?

A. Cost us \$3.50 in money, outside of other preparations we had to make.

Q. Outside of your labor?

A. Yes sir.

Q. What was the work worth to cut down the 360,000 feet?

A. What was the work worth? Work was worth every bit in grain \$365.00.

Q. \$365.00?

A. Yes sir, to cut that timber.

Q. Now, after you had cut the timber down, state what occurred about anybody getting it?

A. After we had cut the timber down, why Mr. DeSha and the high sheriff.

Q. Who is Mr. DeSha?

A. He is the agent, supposed to be over the Three State Lumber Co.'s Land.

Q. Is that the Rust Land & Lumber Company?

A. Yes sir.

Q. Or the Three States Lumber Company.

A. I always call it the Free State Lumber Company.

Q. What did he say about it?

A. He said we had trespassed on the Rust Land & Lumber Co.'s timber and he wanted it and must have it and did bring the sheriff, had a summons a warrant on us.

Q. Where were you when they served the warrant on you, or whatever they served?

A. I was in Coahoma County on Section 10.

Q. On Section 10?

A. Yes sir.

Q. Where is Section 10?

A. Jake Price's.

26 Q. With reference to Section 11?

A. Yes sir.

Q. Where is it with reference to Section 11?

A. With reference to Section 11?

Q. Near it or far from it?

A. Just adjoining it.

Q. What county were you in, you say?

A. In Coahoma County.

Q. What demand did they make on you for it, and what did they say to you about it?

A. Well, they just said they must have it, had to have it.

Q. Well, what did they say if you didn't let them have it?

A. Said if we didn't let them have it, why, of course, they were going to put us in jail.

Q. Did you turn it over to them willingly?

A. No sir, I didn't turn it over to them willingly.

Q. What did you do immediately when they took charge of the timber?

A. When they took charge of the timber, of course, he explained to me that this was the sheriff of Phillips County, Arkansas, by me being a negro man, I just give down, had to give down.

Q. Well, what did you do then?

A. Why, I hired myself to him.

Q. To do what?

A. To run out some timber to the edge of Pecan Lake.

Q. What did you do with reference to bringing a suit about it?

A. I worked on until I got timber rafted, and after I got the timber rafted, why, of course, I pleaded to lawyer Fitzgerald for relief.

Q. After he demanded the timber of you, how long was it before you came to your lawyer about it?

A. About, between five or six days, between five and six days.

Q. By whose advice did you hire to this man?

A. By Lawyer Fitzgerald's advice.

Q. Why did you hire to him to raft the timber?

27 A. Why, because I wanted to raft it, so I could get it together, because the water was pushing right behind: I know if I got it rafted, why, of course, I might get some protection.

Q. What would have been the cost, what would have become of that timber unrafted?

A. Just been gone every which a way and lost.

Q. And the water was then rising rapidly?

A. Yes sir, the water was rising rapidly.

Q. Now Isom, in beginning your cutting over there on this land, how far from Pecan Lake did you start to cutting?

A. Started just about, between fifty or sixty feet from the bank of Pecan Lake.

Q. Then, how far away from Pecan Lake did you cut, on towards Dustin Pond?

A. Cut just about a quarter of a mile.

Q. Now, what land, how broad a space did you cut out?

A. We cut in about, between quarter of a mile.

Q. Quarter of a mile square?

A. Yes sir.

Q. Now, I will ask you to show on this map, if it appears like the situation down there, I will ask you to show where you cut that timber, just take a pencil here and show the jury here, just take this pencil and mark now where you cut that timber with reference to Pecan Lake and Dustin Pond?

A. I cut that timber, right in here.

Q. Alright, now where did you begin on Section 11?

A. Where did I begin?

Q. Yes?

A. I begin right in here, begin right in there and cut.

Q. Now, let me put the map,—this is north, now hold this down, this is north, this is south, and this is east and this is west?

A. Yes sir.

Q. Now, show me here where you begin to cut this timber?

A. This is north you say?

28 Q. Taking this as Pecan Lake, where did you begin to cut?

A. I begin to cut that timber right in here.

Q. Right in there, mark it.

(Witness indicates with pencil.)

Q. Who lives right across the levy there on Section 11 from this land?

A. Right at the levy on Section 11?

Q. Yes?

A. Ellen Jackson, Charlie McGhee.

Q. The owners from whom you bought this timber?

A. Yes sir.

Q. How long have they been living there on this land?

A. They have been living there for twenty-two years to my knowing.

Q. Have they got all of that in cultivation over there on that side?

A. On the inside of the levy?

Q. Yes?

A. Yes sir.

Q. How long have they had that in cultivation there, and been living on it?

A. Been living on it twenty-two years to my knowing. Was living there in this Country in '89.

Cross-examination:

Q. Who did they buy this timber from?

A. King and Anderson and Jo- Williams, Charlie McGhee and Ellen Jackson.

Q. Who did you talk to about it?

A. King and Anderson and Ellen Jackson and Joe Williams.

Q. Who got up the trade?

A. Who Joe Williams got up the trade to sell it.

Q. Who did he go to see about it?

A. I don't know sir, who he went to see about it?

Q. How did you get in on it?

A. Got in on it by buying it from Joe Williams and Mr. King and Anderson.

29 Q. What did you pay for the stumpage?

A. Three and a half.

Q. How did you go over to the place?

A. Went across Pecan Lake in a skiff.

Q. How wide is Pecan Lake where you went across it?

A. It might be about three hundred yards wide, probably.

Q. This was pretty good size timber over there the way you scaled it up?

A. Well, it was good average size.

Q. About like the rest of the timber over there on that island?

A. Yes sir.

Q. How far from Pecan Lake do you call it that you begin to cut?

A. Begin to cut on Pecan Lake, just about between fifty or sixty yards from the bank of Pecan Lake.

Q. This Pecan Lake, is that the same place as some of the folks down there call Old River?

A. Yes sir, I suppose it is, when I come to know about it, they called it Pecan Lake.

Q. You have heard some of them call it Pecan Lake?

A. Yes sir.

Q. The same body of water?

A. Yes sir.

Q. How far is Dustin Pond from the bank of Pecan Lake?

A. Dustin Pond is a little over a quarter of a mile from Pecan Lake to the bank of Dustin Pond.

Q. There is cultivated land you are talking about, that is all south of this body of water they call Pecan Lake?

A. Yes sir, it is over on this side.

Q. And how large a body of water is Dustin Pond?

A. Dustin Pond is a good large body of water.

Q. How wide is it?

A. It looks to be about, as near as I can come at it, looks to be about, somewhere between two hundred and fifty yards wide, or a little wider.

Q. How long was it after Mr. DeSha and the high sheriff of Phillips County, came there to see, that you went to see Mr. Fitzgerald?

30 A. Between five or six days.

Q. And you explained to Mr. Fitzgerald how you got this timber, did you?

A. Yes sir.

Q. Told him who you bought it from?

A. Yes sir.

Q. Told him the same thing you have testified to here on the stand?

A. Yes sir.

Q. And then after you talked with him, you went back, and helped Mr. DeSha get the timber out?

A. Yes sir.

Q. How long did you work with Mr. DeSha after you talked to Mr. Fitzgerald the first time?

A. Worked for him about a couple of weeks.

Q. Getting the timber together and rafting it down in this water you call Pecan Lake, is that right?

A. Yes sir.

Q. What kind of timber was this?

A. Cottonwood.

Q. All of it Cottonwood?

A. All of it cottonwood.

Q. What was the size of those trees?

A. Average from 24 inches up.

Q. Up to what, what was the big ones?

A. Some of them big ones would go as much as forty inches; some of them.

Q. Would they go that high?

A. Some of them would.

Q. Any of them go higher than that?

A. No sir, I don't know of any of them going higher than that.

Q. About 24 to 40 inches?

A. Yes sir.

31 Q. Who was there with Mr. DeSha and the sheriff, anybody else?

A. No sir, Mr. Bowie was there.

Q. Who else?

A. That was all.

(Fitzgerald:) I now want to introduce the agreement between counsel and myself as to the owners of the land, the original lands in Arkansas and the lands in Mississippi, which speaks for itself.

The said agreement is by the stenographer marked Exhibit No. 1 and is in words and figures following to-wit:

32

EXHIBIT No. 1.

STATE OF MISSISSIPPI.

County of Coahoma:

In the Circuit Court, First District, December Term, 1913.

EDD JACKSON et al.

v8.

RUST LAND & LUMBER COMPANY.

In order to expedite the trial of the above styled cause and prevent further expense in regard to the producing of certified copies of deeds, etc., it is hereby agreed by and between the attorneys for the plaintiffs and the attorneys for the defendant that the title in fee simple to lots one to nine inclusive, of Section 11, Township 28, Range 5 West, in the County of Coahoma and State of Mississippi, is vested in Charles McGee, King and Anderson, Joe Williams and Ellen Jackson, and that the plaintiffs herein had the right and authority from said owners to cut the standing timber on said lots within the cause of said owners deeds. And it is further agreed that the title in fee simple to Section 22, and Section 23, all in Township 4, South Range 4 East, in Phillips County, Arkansas, is vested in the Rust Land & Lumber Company, defendants in this cause. It is further agreed by and between the attorneys for both complainants

and defendants that this agreement may be introduced in evidence and used in the trial of said cause as evidence in lieu of the original deeds of conveyance and in place and stead thereof, and shall constitute valid title in the aforesaid owners to the lands as above described.

Signed by attorneys for both plaintiffs and defendants, this the 29th day of November 1913.

MAYNARD & FITZGERALD,
Att'ys for Plaintiff.
WILSON & ARMSTRONG,
MONTGOMERY & MONTGOMERY,
Att'ys for Defendant.

Filed December 1st, 1913.

J. E. MONTROY, *Clerk.*

33 CHARLES MCGHEE, a witness introduced for and on behalf of the plaintiff, having been first duly sworn, testified as follows, to-wit:

Q. Where do you live?

A. Live down on Old River, on Pecan Lake.

Q. Where is the section of land that you live on; what is the number of it?

A. Eleven.

Q. Eleven, twenty-eight, five, Town. 28, Range 5 West in Coahoma County.

A. Yes sir.

Q. How long have you lived there?

A. I have been living there 12 or 13 years.

Q. How long have you owned this particular piece of land?

A. Owned it every since '87 and '88.

Q. You owned it then before you lived on it?

A. Yes sir.

Q. Who lived on it before you as your tenant?

A. Lived on the land there.

Q. Yes.

A. Will Scott, and Nat L. House.

Q. As your tenants?

A. Yes sir.

Q. Is all of the land on the other side of the levy in cultivation now Charlie?

A. On the inside of the levy?

Q. Yes?

A. Yes sir.

Q. I say on the land side of the levy, not the river side, but the land—

A. Yes sir, all in cultivation except a little.

Q. Do you know where these boys cut this timber live here, Isom White, and the co-plaintiffs in this suit, have you been over there and looked to see where they cut this timber?

- 34 A. Yes sir, I have been over there.
Q. Who directed them where to cut over there, Charlie?
A. Who told them where to go and cut it?
Q. Yes?
A. Myself and sister Jackson.
Q. Well now, where they cut over there Charlie, have you ever had a surveyor to survey your lands?
A. Has it been survey over there?
Q. Yes?
A. Yes sir.
Q. Did the surveyor run his lines over there as being your land?
A. Yes sir.
Q. How long ago was that Charlie?
A. That's been, I don't know, sir, exactly how long it has been, but between 12 or 13 years.
Q. Did you know Mr. Houston in his life time?
A. Yes sir.
Q. Was he a surveyor?
A. Yes sir, but he surveyed it before I came in charge of it.
Q. When you bought the land, did you buy his lands?
A. Yes sir.
Q. Where did his lines run to from Section 11, from the fractional part of Section 11, where you were living on, running North?
A. Run across Pecan Lake out near, out to the bank of what is called Dustin Pond.
Q. How far is that from the north bank of Pecan Lake?
A. How far is it to it?
Q. Yes?
A. It is something over a quarter of a mile.

(Montgomery:) We object to that, and move to exclude it, because it is a statement of a proposition of law as to where lines run on the other side of the lake, it isn't competent to prove the lines of a section that way.

(Fitzgerald:) I am simply attempting to prove by this witness where his lines run when he bought the land, and I propose to prove by him he went into actual occupation of the land, has had it ever since then under these lines, and then I propose to show by him what acts of possession he has exercised over this particular land included in the lines by this survey, which is perfectly competent. It is not a question of law as to where a man buys a piece of land as to where he is shown his lines because, provided he is claiming that land, not only under the clause of his deed, but by actual occupation and possession.

(Montgomery:) I submit it is competent to prove that a man has been in actual occupation of a particular piece of land, whether within the real legal lines of land that is described in a deed or not; but you can't prove the lines of the owners run to a certain place, by asking a witness where the lines of that land run, where somebody showed him it run, that isn't competent at all. The lines that he is asking about, that is where the lines run across Pecan Lake; that is merely

a matter of opinion,—an impression of the witness views where the lines should run, not where the lines of the actual Section do run.

(The Court:) I overrule the objection.

Defendant excepts.

Q. What acts of ownership have you and Ellen Jackson and King and Anderson, and Joe Williams exercised over this particular land where the timber was cut, during the past ten or twelve years between Pecan Lake and Dustin Pond, where you saw this timber was cut, what acts of ownership have you done; what have you done to them?

A. What have I done with that land?

Q. Yes?

A. The timber?

Q. Yes?

A. Been cutting it and using it from over there.

Q. What have you done with reference to selling any?

A. May have sold some of it from over there.

Q. Who did you sell it to?

36 A. Sold to Mr. Leavenworth.

Q. How long ago?

A. Well, I couldn't state exactly what number of years it is.

Q. Well, about how long?

A. Been some seven or eight years may be longer than that.

Q. Did you sell anybody else any timber?

A. Well, I sold to him, I didn't sell it my own self, sold it to men getting out the timber, and they sold it.

Q. This time?

A. Yes sir.

Q. The first time?

A. They sold it to the men getting out the timber, and they sold it to Mr. Leavenworth.

Q. How long ago was that?

A. Ten or twelve years.

Q. What, during that ten or twelve years since then, what have you done over there, towards showing it was your land, what have you done?

A. We have been cutting timber off of it all along until here late-

Q. Ever sell Mr. Hull any timber?

A. Yes sir.

Q. How much did you sell him?

A. Well, I don't know exactly, didn't take exact account of it.

Q. How long ago was that?

A. It's been about ten or twelve years ago.

Q. Now, what have you done with reference to having surveyor's lines run through there?

A. Since that time?

Q. Yes, since that time?

A. Well, they have been running some.

Q. Since you owned it?

A. They have been running there some two or three times, Mr. Hull run it out once.

Q. Mr. Hull run it out once?

A. Yes sir.

37 Q. Did he show you where the lines run?

A. Yes sir.

Q. Did it cover these lands that you are claiming?

A. Yes sir.

Q. What was the north boundary of your lands, that you were claiming in there, according to the Hull survey?

A. What?

Q. What was the northern boundary of your land according to Mr. Hull's survey.

A. What was the northern boundary of it?

Q. Yes?

A. How far it run?

Q. Yes, how far did it run?

A. It run to, from the corner of Section- 10 and 14, it run one mile going north.

Q. Well, where did that put you?

A. Put me over on, near the bank, near of the bank of Dustin Pond.

Cross-examination :

Q. The survey that you made made, was made upon the idea of running out the entire lines of the Section that you were on, if it was a full section wasn't it?

A. Full section.

Q. So as to take in a full 640 acre section, was that the idea of your survey?

A. 640.

Q. Yes?

A. No sir.

Q. To size up full section would be what you had your survey made for?

A. We had a half of section.

Q. Well, the full half section?

A. How much is it?

Q. 320 acres.

A. Yes sir.

38 Q. Your idea of a survey, was to ascertain how much of that sand bar over on the other side of this lake you would get, if the lines run out to a full half section, is that it?

A. Yes sir.

Q. What half of a section was yours?

A. What was it?

Q. What was your half of the section, South half, East half, North half, or West half?

A. It was the south and west half running north.

Q. Your deed described the land you bought as lots 1, 2, 3, 4, 8

and 9, Section 11, Township 28 N. Range 5 West, didn't it, that is the way your deed described the land wasn't it?

A. Yes sir.

Q. Or do you know?

A. Sir.

Q. That's the way your land was described in your deed, wasn't it, lots 1, 2, 3, 4, 8 and 9, Section 11, Town. 28, Range 5 W. That right?

A. Well, the way the deed runs.

Q. I say, isn't that the way it read, or do you know, lots 1 to 9 inclusive, Section 11, Town. 28, Range 5 West, that't the land you owned isn't it?

A. Range 25?

Q. 25, yes, Section 11, Town. 28, Range 5 West?

A. Yes sir.

Q. What?

A. Yes sir.

Q. That's the land you owned isn't it, well, do you still own that land?

A. Yes sir.

Q. Your deed didn't convey you any accretions to the land at all then does it?

(Fitzgerald:) We object to that, because it is purely a legal proposition.

Q. I mean, in terms, the words of your deed didn't, — answer until the Court rules on the objection; the words of your deed
39 don't convey you any accretions do they?

A. I don't know sir whether it is on the deed or not.

Q. Do you know how long this land had been there north of this lake?

(Fitzgerald:) I object to the question asked just before this last question; I didn't get time to get my objection in. I object for this reason, we have entered into an agreement which says these parties own this land; then the clause of the deed, it is purely a proposition of law as to whether or not a man owning land, whether he owns the accretions there, would be asking him a question of law.

(The Court:) In view of this witness's answer, I think it is immaterial. He says he didn't know whether it did or not.

Q. How long have you lived down there Charlie?

A. At my home place?

Q. Yes?

A. About ten or twelve years.

Q. Where did you live before that time?

A. I lived up on Mr. Stovall's place up near the brick house.

Q. You are not old enough to have been living there when the cut off was made in the river in '48 are you?

A. No sir, I wasn't here in '48, I was here in 1857 when the water come in July.

Q. You don't know how that land formed over there north of that lake do you?

A. I know a portion of it when the cut off was made, where that cut off was made in 1857, you could go across there, there was a little lake across there, just kind of a wash, and the water come in '57, and washed, cleaned out a lake there.

Q. You don't know how that land formed over there or whether it formed over there when you went there?

A. Yes sir.

Q. This same land that you are claiming?

A. Yes sir.

Q. The main body of water in '57 that you speak of was right along the Mississippi shore, right in there where that lake is now, wasn't it?

A. Where the lake is now?

Q. Yes, that was the main body of water over there, wasn't it, in high water times, this lake was there wasn't it?

A. What.

Q. This lake was there at that time?

A. It was a little small stream, a little small, a little kind of a flat there.

Q. But the main body of water was there, wasn't it?

A. After the high water come in.

Q. Real swift current was there?

A. No sir.

Q. In the high water, where was the current?

A. It was further over.

Q. There is no water between the island, or between the river and the levy on this side, except that big lake and this little pond out there, this pond that you call Dustin Pond was there?

A. Dustin Pond?

Q. Yes?

A. Dustin Pond at that time was a good large stream, it's filled up a good deal since that time.

Q. Does it run into this lake, or not, at low water?

A. Run in this Dustin Pond, run into the lake?

Q. Yes?

A. This lake run around.

Q. It hasn't any outlet at all, has it, this pond?

A. Had which?

Q. Just a little body of water over there without any outlet?

A. Yes sir, there ain't no outlet there, lake come in there and formed in there during the high water.

Q. Where was the timber in '57, do you know, did you know that down there well then?

A. In '57. Yes. All of it that time, except a little piece on this side was opened up, there was a little cleared, open up there.

41 Q. All of this timber on this land in question now hadn't grown there in '57 had it Charlie?

A. Wasn't there.

Q. Wasn't there in '57 was it?

A. Not as thick as it is now, of course, there was some few.

Q. Just a little small cottonwood bushes then wasn't it?

A. Some of it was.

Q. Nothing but a sandbar with some cottonwood bushes growing up at that time wasn't it?

A. Yes sir, some small ones.

Q. And that part of the land never has been attached to the Mississippi shore at all has it?

A. Attached to the Mississippi shore?

Q. Yes?

A. I don't know whether it was attached or not.

(Fitzgerald:) I object to that.

Q. I will frame the question a little bit different, this land north of that never has been attached to it south of the lake, the water between the whole time since then ain't it?

A. Water twix them.

Q. Yes?

A. No sir.

Q. When was it, that there wasn't water between that land and the land south of the lake?

A. Where it wasn't, made it through there.

Q. There is a high bank on the lake, on the south side, isn't there Charlie, south bank is a high bank at low water?

A. On the south side of the lake?

Q. Of that lake, yes? Is there a high bank on the south side of that lake, Charlie?

A. There is supposed to be a bank on it.

Q. Well, I say, it is a pretty high bank isn't it? At lower water mark?

A. I don't say it is quite so high.

Q. How high?

42 A. I couldn't measure.

Q. Ten feet, twenty or how.

A. No sir, I don't know as it is ten foot bank.

Q. The lake is 300 yards wide, isn't it, or over?

A. I don't know sir.

Q. Do you know anything about the depth of the lake, lake depth how deep it is?

A. No sir I never measured it.

Q. Never measured any part of it?

A. No sir.

Q. You don't know it is from eight to twenty feet deep, do you? In the middle of it.

A. No, I couldn't tell.

Q. How long is the lake from one end of it to the other?

A. Might be a mile, three-quarters of a mile, I guess.

Q. Three-quarters of a mile, or a mile?

A. Or a mile.

Q. Might be more than a mile, you haven't measured the distance?

A. No sir, I have never measured the distance, I couldn't tell.

Q. And isn't it deeper on the Mississippi side than it is on the other, isn't it deeper on the side next to the levy than it is further away from the levy?

A. Deeper on this side of the levy.

Q. No, I mean on the south side, it is deeper than it is on the north side of the lake, isn't it?

A. I guess it is a little deeper.

Q. The deepest part of it then is on the south side of the lake, that is true, isn't it Charles.

A. I couldn't tell, I never have went after nothing to measure it to see.

Q. Now, you say you have got some firewood over there since you have been down there on the other part?

A. I didn't measure it when I was doing that.

Q. I say, you have got some firewood?

A. Yes sir.

43 Q. How did you go over there to get firewood?

A. Go across in a boat.

Q. Have you crossed in a boat, or go around nearly a mile to the head of the lake?

A. Crossed in a boat and floated it over.

Q. That the only way you could get your wood there?

A. Yes sir, the only way around.

Q. Have you ever seen that body of water dry since '57?

A. No sir, I haven't seen it dry, not all of the way, I have seen it dry part of the way, not seen all of it dry.

Q. It wasn't dry on Section 11 at all was it, Charlie?

A. No sir, it wasn't dry on Section 11.

Q. And you say that you have, at some time, sold somebody some timber over there, who was it you sold this timber to first, ten or twelve years ago?

A. First.

Q. Yes?

A. Mr. Leavenworth, I think.

Q. You had a written contract with him?

A. Well, I didn't sell it myself, I sold it to the men was cutting it, I sold it to them, and they sold it to Mr. Leavenworth.

Q. Did you have a written contract with the men you sold to, was it in writing?

A. No sir, just paid me so much.

Q. Didn't have any writing about it?

A. No sir, I didn't write any contract at all.

Q. Just gave them the privilege to go there and cut off so much?

A. Yes sir.

Q. How long did they cut there?

A. I don't know sir.

Q. That is how long ago, ten or twelve years ago?

A. Oh yes sir.

Q. You remember what year it was?

44 A. Along in '90, somewhere along there.

: Q. Along in the nineties?

A. Yes sir, along in '92 or '93, along there somewhere.

Q. 1902 or 1903, which do you mean?

A. 1990.

Q. 1902 and 1903?

A. Somewhere, exactly, I don't know.

Q. How long were they cutting in there?

A. I never taken no note of it.

Q. Was it a month or a year?

A. I don't know what month it was, along after Christmas, I don't know whether it was in February or January, I know it was after Christmas, I never took no account of it.

Q. Who else did you sell any timber over there to?

A. Mr. Wyman, I think they sold to him, I never sold none to no company at all, I sold it to these men as cutting timber.

Q. When else did you sell any after that, in 1902, or 1903?

A. What else?

Q. When did you make any other sale?

A. I never took no account of the years at all.

Q. You don't remember any other time on which you sold to these men?

A. Just sold to those men, and them men, they sold it to the company, to these mill companies.

Q. But, you haven't made any sale to anyone since 1902, except to these men, this timber that is in the suit?

A. Yes sir.

Redirect examination:

Q. I understand you to say that you knew Pecan Lake in '57?

A. Yes sir.

Q. What sort of a lake was that then?

A. It was only a small lake.

Q. Where did the levy run in '57, levy they had then with reference to Pecan Lake, where did the levy run with reference to the west end of Pecan Lake?

45 A. Where did it run?

Q. Yes?

A. Just a little small levy over there, no levy to amount to anything.

Q. Did that levy break in '57?

A. I think it did, yes sir.

Q. Now, what did the water do, when that levy broke in there in '57?

A. Just made a wash through there.

Q. Through wherem Pecan Lake?

A. Yes sir.

Q. Did you ever walk around Pecan Lake?

A. Walk around it?

Q. Yes?

A. Yes sir I have been around it.

Q. Where does it go to, does it go anywhere at all, up at the end of it?

A. North?

Q. Yes?

A. Yes, runs around up.

Q. No, I mean at the, say you all started down on the south bank of it and coming around, does it go into anything at all?

A. No sir, runs around down, and runs into Dustin Pond.

Q. Runs into Dustin Pond?

A. Yes sir, what is called Old River.

Q. When you first moved to Pecan Lake, Charlie, how much of a stream was in there?

A. Jut a little small stream in there.

Q. Much as it is now?

A. No sir.

Q. As deep?

A. No sir.

Q. The river had already cut off then had it?

A. Yes sir.

Q. I mean the river then was running where it is now, wasn't it?

46 A. Yes sir.

Q. And what caused Pecan Lake to wash out?

A. This here water come through in '57, in July.

Q. Well, now, where did it go to when it went through there?

A. Well, it went on down, run down through, and then come around into Old River again.

Q. Now, at the end of Pecan Lake, at the north end of Pecan Lake where it runs, does it run into the old river bed, as shown there?

A. Run into Old River?

Q. Yes?

A. Yes sir, runs across into Old River bed, and runs into Old River.

Q. Now, what was Dustin Pond in '57, when you knew it?

A. What was it?

Q. Yes, how big a stream was it?

A. It was right smart stream.

Q. Big as Pecan Lake is now?

A. Yes sir.

Q. Where was the channel of the river then, when the water was up?

A. Channel of the river?

Q. Yes, when the water was up, where did the channel run through?

A. When the water was up, it run through where it is now, where the old river is at now.

Q. I understand, but when the water was up, where did the thin part of the water go, through what place?

A. Through this here, Dustin Pond.

L. W. MASHBURN, a witness introduced for and on behalf of the plaintiff, having been first duly sworn, testified as follows, to-wit:

Q. This is Mr. L. W. Mashburn is it?

A. Yes sir.

Q. Where do you live Mr. Mashburn?

A. Tunica, Mississippi.

47 Q. What is your profession?

A. I am civil engineer.

Q. How long have you been practicing that profession?

A. Eleven years.

Q. What, if any, experience, have you had in surveying, Mr. Mashburn?

A. I have had about what the average surveyor had, I suppose, covering a period of that long of practicing.

(Montgomery:) I think he is a competent surveyor.

Q. You have charge of Mr. Montgomery's ditch—up there, drainage ditch, haven't you?

A. Yes sir.

Q. I present you a map, here Mr. Mashburn showing the location of Pecan Lake, Dustin Pond and Section 11, in Town. 28, Range 5 West, in Coahoma County, and also a skeleton of Sections 22 and 23, Town. 4, S., 4 E., who made that map?

A. I made it.

Q. From what did you make it?

A. I made it from the survey, by survey by myself and coupled with the old field notes by the Government.

Q. Now from that part of the survey which you made yourself, I will ask you whether or not, what this line is right here, that is double line of red and black, marked 6208 feet?

A. That represents the line I run from a known corner at the northeast corner of Section 34, and Town. 3 south of base line, Range 4 East of 5th principal meridian.

Q. In what state?

A. In Arkansas.

Q. Now, I will ask you to show here, or indicate here what shows the line of river as it runs now?

A. The colored, the part colored in green here?

Q. Marked Mississippi River?

A. Marked Mississippi River?

48 Q. Now, I will ask you to say, Mr. Mashburn whether or not you run personally this line from over in the State of Arkansas across the river as it now runs, and brought it, made the triangulation of the river there and brought it down to where the old field notes show that the original bank of the Mississippi river was in Arkansas in '48?

A. I did, 1815 and 1813.

Q. That is the date of the original survey by the U. S. Government of the State of Arkansas?

A. Yes sir.

Q. I will ask you if you surveyed in here, this blue place you got marked Dustin Pond?

A. I did.

Q. Now, where did this Dustin Pond, at its north end on the left hand side, near the figure "2" begin, Section 2, where does it run, Dustin Pond, where does it run to what does it run into?

A. Why it connects with what they call Pecan Lake.

Q. Now, Pecan Lake here, did you make a survey of that too?

A. I did.

Q. Where does that run to?

A. It simply runs out here, like all of these cutoffs, and runs out into nothing, the high ground at the mouth of the cut-off, and at the time of the cut-off spilling over there, fills up first at this point, and leaves the low ground back in the pond.

Q. This is a correct map of that portion of Section 11, of Dustin Pond and the south line of Section 11?

A. Yes sir.

Q. Well from that, that is, how far is it Mr. Mashburn between Dustin Pond and Pecan Lake at the center section of Section 11?

A. Along the north and south center line.

Q. Yes?

A. It is frequently a half mile, got it on my notes somewhere, I would have to scale it.

49 Q. No, is Dustin Pond visible there now?

A. Yes sir.

Q. Is it a body of water?

A. Yes sir; that is: It was when I was there, I suppose it is today.

Q. On the bank of Dustin Pond, right on the south, what is the classes of timber right along to the south of Dustin Pond?

A. Why it is cottonwood timber, I should say avrage from 18 to 24 inches.

Q. Now, what is the class and size of timber as you go back towards the Pecan Lake, in here?

A. Well through there, through this porttion that I got my pencil on in here, there is very little difference in it as you go west, that is: As you go east and northeast, the timber gets large.

Q. Now, how about it on the other side of the bank, on the north?

A. It is still large up there.

Q. It is still larger than that on the south bank, is there a division, what is the banks on the north of Dustin Pond there were they very high, or very low?

A. They are average banks, higher than they are on the south bank.

Q. How wide, that is Dustin Pond is there now?

A. When I was there, it was three hundred and some odd feet wide.

Q. How did the banks range on either side, about how far was visible banks where it shows?

A. I suppose, my best judgment, it would be six or seven hundred feet across it from bank to bank.

Q. Now, how wide is Pecan Lake there in Section 11?

A. On that line, it is eleven hundred feet, that line, of course, isn't straight across.

Q. What line is that?

A. That is the center line of Section 11, North and South center line of Section 11.

50 Q. How wide is Pecan Lake?

A. I judge Pecan Lake is 900 feet wide.

Q. I notice out of Dustin Pond, there is a prong running, did you run that out?

A. I did not, only a part of the way, I know that it, when I was there, it connected with this other prong, however, I know that simply by walking around it.

Q. Now this prong in here, from your observation in there, were high banks in there also?

A. There was high banks, but it was narrow.

Q. But, you could see it was banks there?

A. Oh yes sir, there was banks there.

Q. There was low banks also on this point?

A. No sir, not on this point low bank up there.

Q. High bank on this side?

A. No sir not high banks.

Q. They are low banks in here?

A. Low compared with this bank and this bank. The north bank of Pecan Lake is lower than the south bank of Dustin Pond.

Q. Does your map here now show the true original traverse of the Mississippi River as it ran when the survey was made in 1815 and 1816?

A. It shows, it corroborates the field notes.

Q. Of the Government survey?

A. Yes sir.

Q. Between this point here and Dustin Pond, between the point of Section 22, as shown on your map, being the old shore of Arkansas, is there any depression between there and Pecan Lake?

A. Nothing only the Dustin Pond depression.

Q. Does it run all below Section 22, or as far as you surveyed through there?

A. As far as I surveyed through there, it does.

Q. Now, how many sections of land, Mr. Mashburn is there between this point as shown on your map of Section 22 and Pecan Lake?

A. You mean the distance, how far is it.

51 Q. Yes, how far is it?

A. Why there is about seven thousand feet, I would judge, that is about a mile and a half.

Q. Now, how far is it, does this map here show, the original traverse line of the river, as surveyed in the State of Mississippi in '33?

A. It does.

Q. How far was it from the point in 23, on the right of 23, south-east corner was it, if you let that point remain there where it was in 1815, how far is it between that point and the original woods in 1833, in Mississippi, running east?

A. The original field notes show Mud Lake to be 4 chains from the section corner, from the section, northeast corner of Section 6, Township 28, Range 4 West, Coahoma County.

Q. I will ask you to mark that, that is there?

A. Now, on that same plate, on the Township Plat, they will show without any measurements to it, the Mississippi River banks approximately, drawn to his scale that he has got his plat drawn to, a quarter of a mile further west. If we take that point as correct, and put it a quarter of a mile west of the corner, the west corner of Section 6, Town. 28, Range 4 West, there will be in the neighborhood of a quarter of a mile between the old point of Arkansas, as shown by the 1815 and '16 survey, and the 1833 survey on the Mississippi side.

Q. If that was the case then in '33 when the Mississippi River was located here by the Government's surveyors, if the original point had still remained in Arkansas, as it was in 1815, how wide would the river be at that point?

A. About fourteen hundred feet wide.

Q. Now much wider than Pecan Lake?

A. Very little wider.

Q. Was that or not sufficient to carry off the water?

A. In my opinion, it was not.

Q. I notice here an island, and an island on your map in pencil just below Section 22 and 23, is that shown by the original
52 Government Plat.

A. That is shown on the original Government Plat of fractional Township 4, South of the base line, Range 4, E. of the 5th principal meridian in Arkansas. That island is shown, sketched in on his plat, without any measurements to it at all.

Q. Was that included in the '15 and '16 survey by the surveyors of Arkansas, as a part of the State of Arkansas, or was it surveyed at all?

A. It wasn't surveyed.

Q. When you arrived at the south pond of your line, drawn across the Mississippi River and to the old original traverse of the Mississippi River of Arkansas in 1815 and '16, on a line between Section 22 and 23, was there any depression between that point and this island that we have marked?

A. Surveyed to this point, there was no depression here.

(Maynard:) What point is that, locate it Mr. Fitzgerald, I will just ask the Court to tell him, if he didn't survey, he need not answer as to that point, just show he didn't survey at that point.

A. I didn't survey at that point.

Q. Mr. Mashburn, you say that you didn't survey the land lying between the original traverse, State of Arkansas as shown on your

map, markey 1815 and 1816, and the island which was shown on that old map, but, did you walk over it or walk through it?

A. Why, I walked through the whole territory there.

Q. Was there a distinct depression between this Section 22 and 23 in this old island?

A. In just walking over it, couldn't exactly tell when you got to that very line, but there is a distinct depression in there.

Q. Showing that there had been a water course through there?

A. Well, I don't know that it was right at that point, but I know in that vicinity somewhere, there is a distinct depression running east and west, in that general direction.

L. W. Mashburn map here introduced.

53 Cross-examination:

Q. This depression you spoke of, you don't say it is between this thing they call an island and the Arkansas bank?

A. I say it is in that general vicinity, yes.

Q. You can't locate it accurately?

A. No sir, I never surveyed it.

Q. You have had a great deal of experience in surveying lands and running levels over them to ascertain the elevations, haven't you?

A. Oh, yes sir.

Q. You run any levels over any of that land, to see the different elevations?

A. No sir.

Q. Can you state the difference in elevation, the height of the land between Dustin Pond and Pecan Lake, and the lands further north than Dustin Pond?

A. Why no absolutely, no, I couldn't do it absolutely, I simply know that the land is, north of Dustin Pond or higher than those between Dustin Pond and Pecan Lake.

Q. They are higher?

A. Yes sir.

Q. The timber growth is there older isn't it?

A. It looks to be older, I am not an expert.

Q. And as you approach Pecan Lake, it become smaller, doesn't it?

A. When you get right down against Pecan Lake, there seems to be two banks; I beg your pardon, you are speaking of Pecan Lake, I was thinking about Dustin Pond.

Q. There as you approach Pecan Lake north, the timber is small?

A. I mean coming from Arkansas Island.

Q. Well, now, do you mean between Dustin Pond and Pecan Lake, or north of Dustin Pond?

A. Between Dustin Pond, between Pecan Lake, and the original Arkansas shore.

Q. Well, the land, the timber that lies between Pecan Lake and Dustin Pond?

A. In my opinion is very near of a uniformity after you leave

54 Dustin Pond for the first two hundred feet, which seems to be a second bottom, or lower ground than that after you get back a little further, it is still small timber, but after you get from two to three hundred feet from the north back of Dustin Pond, is along the line that I surveyed there, the timber gets to be,—well it looks to me older than that is on the island.

Q. That is going north towards the island?

A. That is going north towards the Mississippi River as it now runs.

Q. Well now, between Dustin Pond and Pecan Lake, the timber grown smaller as you go towards the southwest, that is — isn't it, or northwest?

A. That is northwest.

Q. As you go towards the northwest between the two bodies of water where it grows narrower, gradually grows smaller, up in there doesn't it?

A. I couldn't notice any material difference in it, it may be though.

Q. Up there where they come nearer together, the timber is quite small?

A. There is nothing there, of course, but bushes, right at the end of it, but after you go back, get back say three or four hundred feet from the connection, the timber seems to be practically the same size it is down here.

Q. It is large timber?

A. I estimated it to be about twenty-four inch timber, I may be wrong in it.

Q. There is some trees between Pecan Lake and Dustin Pond, on, what is that Section 11?

A. Eleven.

Q. Center line of Section 11 is large as 40?

A. I never saw one that I thought was forty inches.

Q. You wouldn't undertake to say there wasn't?

A. No sir, I couldn't, I didn't see any that I thought was forty inch timber though.

Q. Now, going on, what would you call that, northwest?

A. Northeast.

55 Q. Going on towards the northeast to the point where there is no, Dustin Pond, the timber is still larger isn't it, up in there?

A. After you cross this bayou, or depression here, I don't know whether it is a bayou, or a depression, the timber begins to get larger.

Q. Gets larger?

A. Yes sir.

Q. And this thing you call a bayou, a division when you made your survey there wasn't water in it?

A. Yes, sir, there was water in it then.

Q. How wide was it?

A. It was narrow, I suppose fifty or a hundred feet wide.

Q. How far did it extend from its point of intersection with Dustin Pond?

A. Run all around here, and joined it, joined back here to a pond that leads out of Pecan Lake.

Q. Was there water in it all the way around?

A. Yes sir, there was at that time.

Q. Just kind of a washed out, deep slough?

A. It looked like what we ordinarily call a slough, or pocket.

Q. It suggests the formation of a wash out or water course, as you *generally* find on this sandy land??

A. You find them more or less, it is a bayou, you can draw a distinction between one you find on the outside and one your find on the inside, it is simply a bayou.

Q. Those kind of washes are made by the river on newly made land are they not?

A. That is a theory of it, yes, sir.

Q. The south bank of Pecan Lake, has it a well defined bank there?

A. Yes sir, very well defined.

Q. How high is it?

A. Why, I would judge it is between, when I made my *durvey*, between six and ten feet.

Q. How high is the north bank?

A. Low bank is very low, north bank is very low, that is the north bank of Pecan Lake is very low.

53 Q. Between one and three feet?

A. I suppose the highest point in this vicinity here may be five feet above the water of Pecan Lake.

Q. And some places, it is right on a level?

A. As I said, I didn't run the levels over it.

Q. Almost on a level with the sandy part of the land in some place?

A. How is that?

Q. Hardly any bank at all in some places on the north side of Pecan Lake?

A. No, they had very little bank there.

Q. And, as you go from this point, from the point where the east line of Section 11 reaches the north bank of Pecan Lake, the timber gradually grows larger as it goes on towards the Mississippi River, doesn't it?

A. Why, I only know that that country by walking over it, except this line, *ny* walking through that is the only way I know it I consider, as you go this way.

Q. Towards the Mississippi River?

A. As you go northeast, the timber gets larger, after you cross this bayou there.

Q. After you cross the bayou?

A. Yes sir.

Q. Continues to grow larger as you go on?

A. Well, I don't know that it *grown* larger, but it is considerably older looking timber to me than this that is on Section 11.

Q. Older looking?

A. Yes.

Q. Now, you have been a surveyor for how long, Mr. Mashburn?

A. Eleven years.

Q. You have had a good deal of experience in surveying timber lands in this country during that time?

A. Well, I don't know, I haven't had the experience, I suppose, that some people have, I have had quite a bit.

57 Q. During all of that time, you have had a good deal of experience in surveying these lands where cottonwood timber is found?

A. Well, not very much, but then I have had some.

Q. The cottonwood timber is only found in any quantities in this country on the newly made lands on the outside of the levy?

A. It grows better there than anywhere else.

Q. Did you make any observations with reference to the Arkansas shore, as defined by the Government survey of 1833 Mr. Mashburn?

A. No sir, I did not.

Q. There was such a survey made by the Government, was there not?

A. Not that I know of, no sir, not the Arkansas survey, the Mississippi survey was made in 1833.

Q. Do you not know that there was also a survey of the Arkansas bank at that time?

A. No sir.

Q. Did you survey the lines of the Mississippi shore, or examine the lines of the Mississippi shore as indicated by a survey of 1833?

A. Part of it, yes sir.

Q. Does your map show that?

A. Yes sir.

Q. Show the jury there on the map, the Mississippi shore as indicated by the Government survey of 1833?

A. Dotted line there represents it.

Q. That line runs down——

A. Through the——

Q. The meanderings of Pecan Lake, principally, on the north side of the lake?

A. It runs very near on the north side of Pecan Lake.

Q. And follows in the main the meanderings of the lake?

A. Yes sir.

Q. The bounds of the lake?

A. Yes sir.

Q. How long is Pecan Lake?

58 A. It is owing altogether when you measure it.

Q. Did you ever measure it?

A. No, sir.

Q. You went from one end of it to the other?

A. I have been, several times, yes, sir.

Q. What is your best judgment about the length of it?

A. As I say again, that depends on when you measure it.

Q. I mean now.

A. At the present time.

Q. Or, when you were there?

A. When, I was there, well at the time I was there last, I didn't go all of the way to the west end, or the northwest end of it, but I judge from the times that I had been there previous that it must be three or four miles long, possibly five, it all depends, the length of it depends on the stage of the water, of the Mississippi River, or whether it is in a dry season, or in a wet season.

Q. The blue tinted places on your map indicate Pecan Lake and also Dustin Pond?

A. Part of it, yes, sir.

Q. Such part of it as is attempted to be shown on your map?

A. Yes, sir.

Q. That doesn't attempt to show all of Pecan Lake?

A. No, sir, nor all of Dustin Pond.

Q. Is the comparative size, or width of the two lakes about correctly represented by the size in the tinted space?

A. Yes, sir, the map is correct as I surveyed it.

Q. That represents the comparative width of the two lakes?

A. Yes, sir.

Q. Have you ever had any way of knowing the depth of Pecan Lake?

A. Never measured it, no, sir.

Q. Never measured any part of it?

A. No, sir, never measured it at all, all I can say would be hear-say.

Q. You don't know whether it is deeper on the south side,
59 or the north side?

A. No, sir, I couldn't tell you.

Q. From your observation of the banks though, you would say it was deeper on the south side, than the north side, would you not?

A. Well, I don't know, it looks from the formation of the banks though it was.

Q. And steeper banks though isn't it on the south side than the north side?

A. Yes, sir, except I don't know that to be a fact.

Q. That is an indication that the water would be deeper on a high bank than it would be on a low bank?

(Fitzgerald:) We object to that.

(The Court:) I sustain the objection.

Defendant excepts.

Redirect examination:

Q. You say this was the line in 1833?

A. Yes, sir.

Q. And this is the line in 1816?

A. Yes, sir.

Q. Showing, as between those surveys that the river ran between these two lines, one under Section 22 and 23, and the one marked 1833?

A. Yes, sir.

Q. Now, how far is it between the point where the line between Sections 22 and 23, down to the old traverse of '33 of Mississippi?

A. It is very near two miles, mile and three-quarters at least.

Q. Is there any way of telling where that river in there ran in '48, when this river cut off up here?

A. If there is, I don't know how to do it.

Q. There is no indication is there, Mr. Mashburn that the line in 1833 ran exactly like that in '48?

A. No, sir, none whatever.

Plaintiff rests.

60 F. S. DESHAU, a witness introduced for and on behalf of the defendant, having been first duly sworn, testified as follows, to-wit:

Q. Where do you live Mr. De Shau?

A. I live at Alpina, Mich., my home is.

Q. Are you connected in any way with the Rust Land & Lumber Company?

A. Yes, sir, I have been for years.

Q. How long have you been with them?

A. Well, I have been with them for over twenty years.

Q. What is your office with that company?

A. Well, I look out for their lands in general, Timber estimation.

Q. Are you, or not, a land surveyor?

A. Oh, well, I do some of it, I don't answer for a civil engineer at all.

Q. You do some land surveying?

A. I do a great deal of that, yes, sir.

Q. Were you with the Rust Land & Lumber Company, on the 8th day of June, 1914, when they bought this land?

A. I was.

Q. The land in question in this suit?

A. I was.

Q. Do you know anything about the instrument that I hand you, Mr. De Shau?

A. Well, this, I know something of, but I am not well posted on this, that is handled by other parties.

(Montgomery:) I want to read the deed and offer it in evidence.

(Fitzgerald:) I object for a number of reasons;

1. Because the counsel for the defendant and counsel for the plaintiff have already introduced an agreement, have entered into an agreement, which has been introduced, and that that agreement might be effective and should be used in evidence in lieu of the original deeds;

2. Because this instrument here isn't proved, the signatures thereof are not proven as being the deed, unless it is the original deed, I haven't looked at it; and

3. Because the lands herein conveyed are conveyed to W. A. Rust,

who it is not shown is the Rust Land & Lumber Company by any means, and unless proof is made that W. A. Rust has already conveyed the lands to the Rust Land & Lumber Company at some time, the deed so far wouldn't be competent;

4. Further, no matter what the deed might recite as to conveying accretions, it could not convey more than the law allows.

(Montgomery :) That is all-right, we will withdraw the deed. The agreement, we think, covers it.

Q. What time did you begin to handle this land matter of theirs down there at Horseshoe Point?

A. Well, its been about ten years.

Q. You make any surveys to ascertain the lines?

A. Well, I made a great many surveys, yes, in there at different times, I made a survey there twice.

Q. Well, did you find any possession in anybody of the land, on which the timber in controversy in this case was cut?

A. Well, I found it on the island, off of Phillips County, 4 South 4 East.

(Fitzgerald :) We object to where he found it on, said he found it in Phillips County, Arkansas.

Q. I am asking him if he found it in possession of anybody?

A. I didn't find anybody in possession no more than the Rust children which claimed the land.

Q. What evidence, if any, did you find of any claim of possession by anybody of the land on which the timber in controversy in this suit was cut?

A. None whatever, no one.

Q. Were you in charge of the business, or not, of the Rust Land & Lumber Company in connection with their lands and timber down there about that time?

A. I was.

Q. And have been since then, or not?

A. I have, yes, sir.

62 (The Court :) The objection was made a minute ago, that the land was in Phillips County, Ark., the objection is sustained.

Defendant excepts.

Q. What evidence have you observed at any time of anybody being, or claiming to be in possession of the land where this timber was cut, if any?

A. I never had any.

Q. What was the first notice you had that anybody else claimed that timber?

A. First notice was, that was on Saturday, January 18th.

Q. Of what year?

A. 1913.

Q. How did you obtain that notice?

A. Well, I come into Memphis, which I had a man here that

looks after these lands all of the time, and he had advised the office in Memphis, and I come in there on Saturday.

(Fitzgerald:) We object.

(The Court:) I overrule the objection.

Plaintiff excepts.

Q. Don't tell the conversation, that was or not the first notice that you had received anybody had trespassed, or claimed set-up?

A. Yes, sir, that was the first notice.

Q. What, if anything, did you do?

A. I came down here.

Q. What did you find Mr. De Chau?

A. I found that he had cut some timber over there, which we claimed to be on the island.

Q. What timber was that?

A. Was the cottonwood.

Q. I mean with reference to whether or not it was the timber that is replevied in this suit?

A. That was the timber replevied in this suit.

Q. What did you do with reference to going over there to see them about it, or taking anybody with you over there for anything?

63 A. Well, I went down to Helena and got a deputy sheriff of Phillips County and took him down there.

Q. What kind of affidavits did you sue out, if any?

A. In Phillips County.

Q. What was the nature of the action?

A. Well, they served a paper on these colored fellows not to cut any more timber there, and that I was taking possession of the timber.

Q. From whom did you obtain those papers?

A. From Helena.

Q. From what office?

A. The Sheriff.

Q. Where did he get the writ that he had?

A. Well, I expect that he got it from the attorney's office.

Q. Did you have a lawyer employed over there in Helena to sue out these?

A. Yes sir, Mr. Saterfield, and whatever his partner is, he was the man that got the papers.

Q. What was the paper that this man carried over there, if you know, where is that paper, if you know?

A. I don't know where the paper is now.

Q. What was that paper?

A. I couldn't tell you that.

Q. Was it a writ, or notice, or what was it?

A. It was a notice.

(Fitzgerald:) We object unless he knows what it was.

Q. Do you know what it was?

A. It was to notify these fellows not to molest that timber any longer.

Q. Who wrote the notice?

A. Mr. Saterfield.

Q. Of the firm of Moore & Saterfield, in Helena?

A. Yes sir.

Q. And who signed it?

A. The sheriff, he handed, the sheriff, he signed it himself.

Q. He signed it himself?

64 A. Mr. Saterfield and he had some witnesses come in and sign it.

Q. And handed it to the deputy sheriff, or to the sheriff himself?

A. Yes sir, handed it to the deputy sheriff.

Q. What was the name of that officer?

A. John; I have forgotten.

(Fitzgerald:) We object, unless he knows.

Q. Do you remember the name of the officer?

A. That's the fellow, I am trying to think of his name now, his first name was John, I know, but I have forgotten his other name.

Q. He went over there with you?

A. Which to Helena?

Q. No, from Helena, over there to see these plaintiffs?

A. Well, sir, the fellow, the deputy sheriff.

Q. What did you say, or he say to any one of them, about arresting them and putting them in jail, if anything?

A. Why, he served the papers on them and told them, they dasen't go over and molest that timber any longer, that I was taking charge of the timber, and they were satisfied.

Q. What did they say?

A. They give up the timber at that time in my possession.

Q. What did they say?

A. The negroes.

Q. Yes?

A. Well, they said that they had bought this timber from different parties, there was six of them, and Isom White and Zanders Parker, told he and I that they had purchased this timber, bought this timber rather from King and Anderson; Will Scott, said that he had bought the timber from Ellen Jackson; Burt Coleman and Nicholas said they had bought the timber from a man named Joe Williams.

Q. What did they say, if anything, about releasing it, or not releasing it?

A. Why they said they would release the timber.

65 Q. What threat did you make against them, if any, if they didn't release it?

A. Well, the deputy sheriff told them that if they ever went across there, or didn't release this timber, they were going to take hold of them and take care of them.

Q. That was over in Mississippi that this conversation occurred was it?

A. Yes sir, that was in Mississippi.

Q. He told them that they might be taken and arrested if they went over there on that land any more?

A. He did, told them he would take them down to Helena.

Q. What did they say with reference to whether they owned the timber then or not?

A. Oh, they didn't say they owned the timber, they said they had bought the timber.

Q. What statement did you make to them about whether you owned the timber?

(Fitzgerald:) We object to that.

(The Court:) I sustain the objection.

Defendant excepts.

Q. What offer, or threat, of violence did you make towards these plaintiffs if they moved that timber?

A. Well, that was all that was said, that if they ever crossed over or taken that timber, or molested that timber in any way, that they were going to be put in jail, taken care of.

Q. And who said that, you or this deputy sheriff?

A. The deputy sheriff.

Q. What did you say yourself?

A. I told them also that that was my intention to do.

Q. What did they say exactly then, either one of them, after you said that?

A. Well, they said they wouldn't do any more to the timber.

Q. What contract, if any, did you then make with them?

66 A. Well, the next day, I hired those fellows; I told them I would give them one dollar per thousand to float this timber out of the woods and take it down to the Mississippi River, at a point where they called Ledbetter, I think, where I could either load it on barges, or raft it, take it down the Mississippi River, they said they would do it.

Q. What did they do, if anything, with reference to carrying out that agreement?

A. Well, they went to work at it, and they floated some of it, and I hired some more negroes, put them on there and *float* floated myself, drug the timber out of brush, and we kinder put it up, I got some blocks etc. and put it up so they would hold together and took them and floated them down the Mississippi River.

Q. How long did they continue to work on that before the writ of replevin was issued in this case?

A. They replevied of me the 8th day of February, the first floating was done, was done on the 22d day of January.

Q. And the conversation between you and the deputy sheriff and these plaintiffs was on what date?

A. It was on the 21st day of January.

Q. And when was the writ received?

A. They replevied of me on Saturday February 8th.

Q. Where was the timber then?

A. Part of the timber, a little over half of the timber was out to

the island on that Old River, and the balance of the timber was across the old river, near the levy, out near the levy.

Q. Is what you call Old River, was it sometimes called Pecan Lake, or not?

A. I never knew it by Pecan Lake, but I know it by Old River.

Q. You notice a body of water on the map there that is testified to by Mr. Mashburn, the larger blue tinted place towards the south of the map?

A. Yes sir, there is one part of it.

Q. Is that or not then designated Old River?

A. That's what I know as Old River, what I have always known it as.

Q. Where do you get the name of Old River?

67 A. I get it from everybody that is around the country that I have talked to.

Q. Did you ever hear it called Pecan Lake?

A. Never do.

Q. What is the name commonly given to this smaller body of water north of what you call Old River?

A. Well they call it Dustin Pond.

Q. Is that body of water at low water any outlet?

A. Well, yes, they have an outlet into the main channel out of Old River.

Q. How long have you known these two bodies of water?

A. Well, the first time that I was in there was in 1896.

Q. How is the timber between the original Arkansas Shore, as shown by the old Government surveys and this body of water that you call Old River?

A. Well you take about this far here and the end of this pond—

Q. The northeast end?

A. The southeast end rather, this is old timber in here, very old growth timber now until you get out here, there is kind of a drop here, it gets into lower land, and this seems to be a good deal younger timber.

Q. How is it between Dustin Pond?

A. That is timber, I should judge about, the best of my knowledge would be timber, possibly along 55 to 60 years old.

Q. Now, how is the bank of this Old River, the true bank, the north bank and south bank, as to their relative height and steepness?

A. The south bank of this Old River is rather high; well, in fact, the levy runs quite close to this Old River today.

Q. Where does this levy run?

A. Right here at this point, it is very close here.

Q. You mean the lines south-bound?

A. Yes sir.

Q. Very close to it?

68 A. Very close to it.

Q. About how far?

A. This bank here, at low water is, well, I should judge between eight and ten feet high.

Q. How high is it on the north bank?

A. On the north bank is lower ground, very much lower.

Q. Is that a steep bank, or a sloping bank?

A. A sloping bank.

Q. The timber on the north bank of Old River, does it grow larger or smaller as it proceeds towards the northeast?

A. Right at the bank of the Old River, it goes up pretty much into large willows.

Q. From there, on to the northeast line, does the timber grow larger or smaller?

A. Well, there ain't much difference in the growth of the timber, except in ridges, now you will find timber that seems to be older on one ridge, and then you drop down a little further, and the timber is a little smaller, according you go to the edge of the river.

Q. Going to the northeast corner, clear to the old original bank of the Arkansas Shore, how is it as to whether it grows larger or smaller as you go towards the Arkansas Shore?

A. Don't seem to be very much difference, I think a little smaller right here than any part of—

Q. Right about,—east of Dustin Pond?

A. Yes sir.

Q. This little depression indicated near the southeast of Dustin Pond there, what is that, a slough, or washout, or what is it?

A. Well I don't know, there is an old slough there that comes in, just a small slough grows up with brush.

Q. Did you ever survey those lines, from the original Gov. survey down to Old River?

A. Well, just in a general way for my own purposes, I have never made no survey.

Q. For what purpose did you make this survey?

69 A. Purpose of estimating timber.

Q. You know anything about who made this plat or map?

A. Well I think Mr. Schlierholz—

(Fitzgerald:) We object.

(The Court:) I overrule the objection.

Plaintiff excepts.

Q. Do you know whether any survey was made by any surveyor, which this map represents?

A. Yes, Mr. Calhoun made a survey.

(Fitzgerald:) We object; before he testifies to that map, I want to question him as to what he knows about it, so that I can tell whether or not he knows what he is testifying about.

Q. Do you know whether or not there is any field on any part of the land of the Rust Land & Lumber Co. claims over there?

A. Yes sir, there is.

Q. Where is the field?

A. The filed is, one right about here.

Q. Show, on the map up there on the wall, where the field is?

A. Now, the field we will show is right in here, and there is a little

field that runs in here, south of it, and the other one lies right here, down here.

Q. Now, what section is the field on, is the field you speak of on?

A. Well, now that is on an island, as far as the second part, I except.

Q. Locate on the different sections, where the fields you spoke of are to be found?

A. Well now, this ought to be found in 14.

Q. How much field is there in 14?

A. Oh, there is over a 160 or 170 acres I guess.

Q. Whose field is it, who is cropping it?

A. It belongs to Rust Land & Lumber Company.

Q. Who is working it?

A. Mrs. Pearl Blair.

Q. Renting it from anybody?

A. Renting it from the Rust Land & Lumber Company.

70 Q. Where is the other field?

A. Right south of it, in this in here.

Q. Who is working it?

A. No one, simply an abandoned field.

Q. Where is the other field?

A. Other one is down here.

Q. You mean east of Dustin Pond?

A. Yes sir.

Q. Dustin Pond is on what section?

A. I call that on Section 23.

Q. Now, who is working that, if anybody?

A. No one.

Q. You know when that field was cleared up there?

A. I don't, no sir.

Q. Do you know who has ever worked it, if anybody?

A. I do not.

Q. This field that you say Mrs. Blair is working, how long has she been working that field?

A. Four—

Q. Does that include this year or not, what years has Mrs. Blair been working that field?

A. Mrs. Blair has been working the field herself two years, and Mr. Blair her husband, worked it for two years before he died.

Q. What two years did she work it?

A. She worked it last year and this year.

Q. What years did her husband work it?

A. The year before that, and the year before that.

Q. And whose tenants, if anybody's, were they working it?

A. They were working, we rented the fields to them.

Q. Now before her husband had worked it who had worked it, if anybody?

A. A colored man by the name of John Sime.

Q. What years did he work it?

A. He worked it on and off, just previous to that, I couldn't tell you.

71 Q. Who worked it in 1909?

A. John Sims.

Q. Who in 1908?

A. John Sims.

Q. Who in 1907?

A. Mr. Blair.

Q. Who in 1906?

A. I guess 1907, this is '13, Blair had it four years and John Sims before that.

Q. Let's go back and get the years as they come, '13 who worked it?

A. Mrs. Blair.

Q. In 1912 who worked it?

A. Mrs. Pearl Blair.

Q. Who worked it in 1911?

A. Mr. Blair.

Q. In 1910?

A. Mr. Blair.

Q. In 1909?

A. John Sims.

Q. In 1908, who worked it?

A. I think John Sims, I don't know.

Q. Were you down there at any time?

A. I just go down there and knew somebody was working it, but I wasn't acquainted with John Sims then.

Q. What tenant was working it in 1908?

A. Dan Fitzhugh.

Q. Was Dan Fitzhugh's tenant working it?

A. He was renting it for the Rust Land——

Q. Who worked it in 1907?

A. I don't know.

Q. Were you down there in 1907?

A. No.

Q. Or in 1906?

A. No, I was off west.

Q. 1905 or 1904?

72 A. No sir.

Q. You wer-n't there those three years?

A. No.

Q. When did you first see that field?

A. I saw, first seen that field in 1896.

Q. 1906, or 1896?

A. 1896, I was down here and went all over that island.

Q. That before or after the Rust Land & Lumber Company?

A. After they had bought it.

Q. From whom did they buy?

A. Well, that I don't know.

Q. Who has paid the taxes every year since 1894, on that land that you know?

A. I can't answer that.

Q. You do not handle the payment of the taxes?

A. I do not.

Q. What timber, if any, has there been cut off any of that land during the time that you know it, other than the timber in controversy?

A. Well, there has been a great deal of timber cut on the river banks over there, the bank keeps caving.

Q. Who cut it?

A. Mr. Bowie.

Q. Who is he?

A. Henry Bowie.

Q. Yes?

A. He is the man that is looking after those lands.

Q. On what sections has he been cutting?

A. He has cut off 27, 26, and along that part of the country he has cut in 20, near Miller's Point just above Friars Point.

Q. Who, if anybody, has cut any timber on Sections 22 and 23 on which these plaintiffs cut this timber?

A. No one that I know of except that we cut, the bonded timber, fellow named Charlie Sherman he cut some one year.

Q. You mean saw timber?

73 A. That may have fallen down by wind, thrown down by wind, and I had that cut out.

Q. Who cut that?

A. Charlie Sherman and colored fellow named Andrew Silas.

Q. For whom did they cut?

A. Cut for us.

Q. You mean the Rust Land & Lumber Company?

A. Rust Land & Lumber Company, yes sir.

Q. When did they cut?

A. They cut some three years ago, and they cut some four years ago and since.

Q. What sections was that timber on?

A. Well, it was cut on an island.

Q. Cut on the accretions?

A. On 30, 20 and 23.

Q. On the accretions, or main shore?

A. Accretions.

Q. What timber, if any, has the Rust Land & Lumber Co. caused to be cut between Dustin Pond and Pecan Lake?

A. Simply cut the timber that was thrown over by wind in that part of the country.

Q. You say that was how long ago?

A. Three and four years ago, five years ago, we cut some out of there and loaded some out of there.

Q. That was between Dustin Pond and Old River?

A. Yes, sir.

Q. You know the timber that has been levied on in this case, you know it, do you?

A. Yes, sir.

Q. You have examined it and scaled it or not?

A. Yes, sir.

Q. Who scaled it?

A. I have,—well a man named Jim Sexton and a man named W. H. Daught.

Q. Were you present or not when it was scaled?

A. I was right there.

Q. Do you know what it scaled?

A. Yes sir.

74 Q. You made the bond for the company that was interposed in the replevin of this timber, did you not?

A. Yes sir, the company had to make bond.

Q. What did you do with that timber after you made bond?

A. I floated it out at this point known as Ledbetter Landing on the Mississippi River.

Q. What disposition did you finally make of it?

A. Well, I sold it to W. D. Reeves, of Helena, and loaded the timber on barges.

Q. Where did you sell it to him, at Helena?

A. I sold it to him right from here over the telephone.

Q. Sold it to him, where, the price was so much at what place?

A. At Helena, and I was here at Friars Point at the hotel.

Q. Were you to deliver it at Helena, or not?

A. No sir, I was to deliver it to the barges over there at Ledbetter, and he was to load it?

Q. Where was the barges, at Ledbetter?

A. At the barge.

Q. Where is Ledbetter?

A. Right straight south from where this timber was cut practically, where it comes out to the Mississippi River, it is about three miles, I should judge, or three and a half miles from where the timber was cut.

Q. Where was the timber when it was loaded on, you say it was all in the Old River, at that time or not?

A. I know the timber was in the brush where it was cut.

Q. You know the value of that timber?

A. Yes, sir.

Q. Per thousand feet?

A. I know what I sold it for.

Q. Were you acquainted with the value of timber?

A. Market value of timber at that time, yes sir.

Q. You were acquainted with the market value of that timber at that time, and at that place?

A. Yes sir.

75 Q. What did the scale of that timber amount to?

A. Well, the scale of that timber amounted to 301,429'.

Q. And what was the cash market value of it at the place where you sold it?

A. Eleven dollars per thousand.

Q. And what did it cost to put it there from the place where it was levied on?

A. Well, it cost from the place where they levied on me, it cost about fifty cents a thousand to put it there.

Q. Did you or not ever measure the depth of the water in Old River?

A. Yes sir, I have.

Q. To what extent did you measure it?

A. Well, I measured right across Old River.

Q. At what point?

A. I measured it on the section line between 12 and 11, I measured it on the quarter line, 12 and 11, I measured it on the section line between 10 and 3.

Q. What was its deepest place?

A. 19 feet.

Q. What was it as to whether it was deeper or shallower on the south part of it, than on the north side?

A. It is deeper on the south side.

Q. About how much comparatively?

A. Well, I think she run from eight to ten feet on the north side and she run from thirteen to fourteen feet on the south side, in the center ran from sixteen to seventeen feet on the open water now.

Q. From the north side going toward the center of the lake, did it gradually increase in depth?

A. Yes, sir.

Q. And from the south side going north?

A. Yes sir.

Fitzgerald: We object to leading.

Q. The greatest depth extended about how far from the south bank?

76 A. From the south bank, well we taken about a hundred feet.

Q. From the north bank?

A. Same distance, or a hundred feet, same distance.

Q. On that north bank, or south bank?

A. From the north bank and south bank both.

Q. What is the distance across it?

A. The distance across it would make an average of about 850 feet.

Q. How wide was the deepest part of it?

A. Well, I don't know as I could say exactly how wide it was, but I should judge it would be maybe over, maybe a couple of hundred feet.

Q. Where does the water on that Old River begin?

A. Well, from the north end, from the east end.

Q. Yes?

A. Well, it begins along below the township line about three-quarters of a mile.

A. About how far from where this timber, from the point on Old River opposite where this timber was cut at the northeast end, begin the east end?

A. Well, it would be about two miles.

Q. And how far south does it go from there, or west?

A. Or west, it runs up within, Oh, less than 80 rods, that would be a quarter of a mile from the township line.

Q. Well, then, it is how far from the point of Old River, opposite where the timber was cut?

A. Well, it would be about two miles from the west side, and the other side would be about a mile.

Q. And the length, of the Old River is about how much?

A. Length of Old River, let's see, it would be, one, two, be three miles.

Q. Is it of an uniform width, or does the width vary materially on the whole length of it?

A. Oh, I don't think it varies very much, of course, it is in a Crescent Shape you know.

Q. And the average width is what?

A. I think would be along about 850 feet.

77 Q. Did you ever measure clear across it to see what the width was?

A. Yes sir?

Q. What was the result of that measurement?

A. You will find it in different parts, while I can't recall that now I think we got a note of that.

Q. You remember what your measurement showed?

A. Well, some thirteen, over thirteen chains in some part of it.

Q. And a chain is how much?

A. Chain is four rods, be 66 feet, as near as we can get chains, be 66 feet and a half.

Q. Did you ever make any measurements or not of Dustin Pond's depth?

A. Yes sir, we have some measurements made of that.

Q. What is the depth of Dustin Pond at its deepest?

A. I have never measured the water in Dustin Pond.

Q. What is the width of Dustin Pond, if you know?

A. Dustin Pond is about four rods wide.

Q. And the length of it?

A. Well, the length of it would be a little, about a mile and a half the way it runs, that is in a crescent shape.

Q. The body of water that you call Old River and is sometimes called Pecan Lake, approached the Mississippi River on the East and West, or North and South?

A. Well, you may say east and west and north and south, it is simply a horse shoe.

Q. Now, at the two ends of it, what is the distance of the water to the Mississippi River in the low water?

A. In the water, from the west end?

Q. Yes?

A. Well, from the west end to the Mississippi River, would be about two miles I guess, or a little better.

Q. And from the east end to the Mississippi River, what is the distance?

A. Well, that would be a good deal longer from the east end,

78 quite a bit longer, I guess, would be with the water would be, over three miles.

Q. What is there at each end of the lake, if anything, in the nature of a depression?

A. There are a lot of small willows, regular willow swag.

Q. How about that?

A. Comes about half way up going to the timber.

Q. How is the timber between the two ends of this lake and the river?

A. Well, it is just an ordinary growth timber, I should judge that the timber possibly would be along from fifty to sixty, to sixty-five years old.

Q. That extend or not to the bank of the river?

A. Yes sir.

Q. How are the banks of the river, and are they caving bank, or not?

A. Well, pretty hard to tell now today whether they are caving banks or not on the east end as it is filled up, those banks, are not caving banks today.

Q. In high water when the Mississippi River is up at the top of its banks, is there a current or not through there anywhere?

A. Yes sir, there is a current there.

Q. Where is the current?

A. The current leads right south.

Q. How does it flow with reference to the river, or Pecan Lake, as it is called?

A. Well, it flows right in to Old River at the south end.

Q. Which way does it flow?

A. Flows south.

Q. You mean southwest, or what?

A. Flows south right from this present Mississippi River. The current flows south.

Q. How is the current between there and the island?

A. Well, that would be right on the island.

Q. Well, I mean between Old River and the island, where is the strongest current when the river is up?

79 A. The strongest current is in Old River on the west side.

Q. Can you tell, from your observation of the timber growth between Dustin Pond and Old River how old those trees are?

A. Well, between Dustin Pond and Old River, I have stated before I think after you get south by the end of Dustin Pond which is the main ridge there, which shows the marks of the old original banks, then you get into a smaller growth of timber, but it is not exactly a small growth of timber, you will find cottonwoods there that is 35 and 36 inches in diameter, and as you go on south to the banks of the Old River, you will find where your timber is a little smaller.

Q. As you approach Old River, it grows larger or smaller?

A. Smaller as you approach Old River.

Q. Could you approximate the age of it, on this crossing, from the observation of it, and experience as a timber man?

A. Well, that's quite a question, now the growth, the timber shows

today that there was some of that timber that grewed, and was considerably older, but at the north from the Dustin Pond, after you strike the second growth timber, as we call it as it is as you go down to the Old River, the Old River bed today.

Q. The question was, whether from your experience as a timber man, you could approximate the age of the timber from your observation of it on those accretions?

A. Well, I always think I do.

Q. Well, give the jury some idea about that?

(Fitzgerald:) We object, unless he shows he is competent to do that and is an expert of that sort; now if he says it is quite a question—

Q. How long have you been engaged in the timber business?

A. Well, about my lifetime, ever since I was big enough, thirty-five years.

Q. How old are you?

A. Fifty years of age.

Q. How long have you had experience in cottonwood timber?

80 A. Since 1896.

Q. And what has been your experience, what extent have you been experienced in cottonwood timber?

A. Well, I have estimated a whole lot of it in the different parts of the country.

Q. What do you mean by estimating it?

A. That is estimate the amount of timber would be on certain pieces of land.

Q. What way, have you, if any, of determining the age of a tree by observation?

A. Well, that is, in the cottonwood line.

Q. I mean a cottonwood tree.

A. Yes, well, by the size of them, and the place they grow on.

Q. Can you or not give a correct, approximately correct idea of the age of the trees from your experience and observation?

A. No, I wouldn't say that I would.

Q. How near can you come to it?

(Fitzgerald:) I object.

(The Court:) I sustain the objection.

Defendant excepts.

Q. You say you can't give an approximate idea of the age of a tree from observation?

A. I cannot, not right—

Q. Referring again to the field you say had been in cultivation for certain years that you know of on the island, I will ask you to what extent, if any, there was any fence around that field or any part of it?

A. Yes sir, there are fences on all of those fields, that is on the island, had been.

Q. How long have those fences been there?

A. Well, they were there, when I first noticed them here along about six or seven years ago.

Q. How many years ago?

A. About six or seven years ago when I first noticed the fence there.

Q. Had you or not been there before?

81 A. Oh, yes sir, they were old fence- but I hadn't seen them until I knew the island in the estimation of timber.

Q. Why hadn't you seen them before that time?

A. Because I hadn't run in those fields.

Q. Hadn't been on that part of the island?

A. I was all around there.

Q. How long do you say you remember seeing this fence there?

A. I remember seeing this fence there for seven years.

Q. Now, there is or not a little prairie or open field, cleared land down near the east side of Dustin Pond?

A. Of Dustin Pond, yes sir.

Q. What is that known as?

A. That is known as the Plum Orchard.

Q. What is it?

A. It is a little old field.

Q. What is it with reference to being a plum orchard?

A. There was some of those red plums there, I ate some myself out of there.

Q. What fence is there?

A. An old barbed wire fence.

Q. How long has that been there?

A. I haven't noticed that any longer than seven years.

Cross-examination:

Q. Mr. De Chau, I believe you stated that you were not a civil engineer?

A. I am not.

Q. You never established the corners of Horse shoe Island?

A. I did not.

Q. You don't know then where the corner is between Sections 22 and 23?

A. I do not.

Q. Do you know where the corner is between Sections 11, 14, and 15?

A. I do not.

Q. You don't know what part of that island is original shore, and what part is accretions?

82 A. Well, there is a cut-off there on this side, on the east side of the field, the first field, which everybody always told me, that was cut off of the old river.

Q. It is what they told you?

A. That's what they told me.

Q. But, you don't know?

A. So far as I,—I don't.

Q. You still don't answer the question, do you know what was original land and what was accretions?

A. Well, there is some of that land there that shows where this big cane bridge, looked to me to be the original line of the State of Arkansas on the island.

Q. Wherever you find cane then growing, you consider that original?

A. Well, that is old timber, and it is very high and fine.

Q. How much of that Horseshoe Island, the original land is there now, about how many acres?

A. Be pretty hard for me to say, I couldn't answer that.

Q. I thought you were familiar with it?

A. I am familiar with it.

Q. Can you approximate how much?

A. No, I couldn't the way it runs around there, it is a hard thing to do, unless you run the survey from the State of Arkansas in there.

Q. Can't you tell from the edge of the timber about how much?

A. Well, I expect I can as far as that is concerned.

Q. Well, have you done it?

A. But I never paid much attention to that, I was cruising the island to cut all of the timber between those cut-offs.

Q. You can't say then whether there is a thousand acres, or five hundred?

A. I can't.

Q. Of the original territory?

A. I cannot.

Q. Don't you know there is more than five hundred acres?

83 A. Well, I should judge there would be, but then I am not prepared to say how many acres there were.

Q. I thought you were familiar with all of that?

A. I am familiar with the island.

Q. You live in Michigan?

A. I used to live there.

Q. The Rust Land & Lumber Company is a corporation from Michigan?

A. I have been with the Rust Land & Lumber Co. for sometime.

Q. That is a Michigan corporation?

A. I think they were incorporated in Wisconsin.

Q. You have been working for them for a long time?

A. Long time.

Q. How long?

A. Over twenty five years.

Q. How long have you been working for them down on this island?

A. The first I went on the island was in '96.

Q. '96 or 1906?

A. 1896.

Q. Did you go down as far as the land from which this timber was cut in '96?

A. I did, went all around it.

Q. You went all around it then?

A. Yes, sir.

Q. The next time you went around it was when this timber was cut?

A. Oh, no, I went around that a hundred times since that.

Q. How did you go around it, in a boat?

A. Walked around it, went around in a boat and every way.

Q. How often did you go around it?

A. I go around it probably five or six times a year.

Q. Every year since that?

A. Every year, no not since that, I went away after that.

Q. Where did you go?

A. Out in California, and Mexico.

Q. How long were you gone?

84 A. I was gone several years, six or seven, or eight years, more or less.

Q. When did you come back?

A. I come back here ten years ago.

Q. Now, isn't it a fact that you are claiming as accretions to Horseshoe Island, all of the lands in that horseshoe bend where the Mississippi River used to be, plum up to the Mississippi shore?

A. Yes, sir.

Q. All of that accretions you claim belongs to Horseshoe Island?

A. Well, inside of that Old River.

Q. Making that five thousand acres of accretions?

A. No, I don't think it would make that much of accretions.

Q. How much then?

A. Well, I don't just exactly know how much it would make, but I don't think there is that much in the whole island.

Q. Well, how did you get your idea that there is about that much?

A. I don't get no idea of anything.

Q. You don't fix any amount?

A. No, sir.

Q. It is several thousand acres, isn't it?

A. Well, I don't know what you call several; now, I would call there is probably three or four thousand acres in the whole island.

Q. You don't know what several means then, well how is it that you know so much about the age of this timber, if you can't tell about how many acres there are?

A. Well, I can tell, if I see a tree, what size it is, and form an idea as to how long it has been growing there.

Q. You ever count the trees?

A. Great many times I have.

Q. Counted all of the trees in that accretion?

A. Oh, no, but I have counted in parts, portions of it, formed up grades, get them up.

Q. You don't know anything about the Mississippi Shore, do you, the corners of the land on the Mississippi Shore?

85 A. Well, I know where several of them—

Q. Well, do you know where the northeast corner of Section 6, Town. 28 Range 4 West, in Coahoma County is?

A. Section 6.

Q. Yes?

A. I do not.

Q. Do you know where the corner between six and seven, and Town. 28, Range 4 West is in Mississippi?

A. I do not.

Q. Now you don't know anything about the corners of the lands in Mississippi, do you?

A. I know the corner of Sections 10, 11, 15 and 14.

Q. In Mississippi?

A. In Mississippi, Coahoma County.

Q. How did you locate that point?

A. Located it with a civil engineer.

Q. You did it yourself?

A. No, I did not.

Q. How, did you know then it was the corner?

A. Well, a man was up there that had these lines run out, and showed us the post that was driven there.

Q. Well, where is the corner between Sections 11 and 12, on the south boundary line?

A. Eleven and twelve?

Q. Yes, how far from the levy?

A. Oh, I don't know, I don't think it is over 16 or 17 chains.

Q. The levy runs all along Dustin Pond and up north?

A. The levy, no, sir.

Q. The levy runs all along near Pecan Lake on north between McKee's house and this island, doesn't it?

A. Well, I never heard of Pecan Lake, but I understand——

Q. Well, you know what we are talking about when we say Pecan Lake?

A. I know the old river, the levy runs around that old river.

86 Q. Just upon the hill all around?

A. Right close to Old River, that is to a point about center of Section 11, north and south.

Q. And the Rust Land & Lbr. Co. claims all of the land then up to that levy, all the way around in that bend?

A. No, they don't, they claim the land north of the stream, that is north of the levy.

Q. North of the stream, what stream, Dustin Pond?

A. No, not Dustin Pond, not as they have it marked but Old River.

Q. Old River?

A. Yes, sir.

Q. Now, don't you know, as a matter of fact, that Old River, that you call Old River, doesn't run up to the Mississippi river on the north, running north?

A. Well, there is two outlets, one coming in there, and one going out of there.

Q. Don't you know, as a matter of fact, Capt. McKee had a big field down there near his house in this bottom, extends away out, and

the only stream there is between Capt. McKee's field and the Arkansas shore, and it is near the Arkansas shore?

A. I know there is a question of lines right near the Rust Land field and goes in, in that lake, I have followed it several times, not one time, several times.

Q. It is not solid land all the way across there where McKee has his field, away out?

A. It is west of McKee's field.

Q. And near the Arkansas shore isn't it?

A. You don't tell it was the Arkansas shore on the west side of that cut-off.

Q. There is a high bank there isn't there?

A. Not very high.

Q. You have got a field near there?

A. Yes, sir.

Q. Belongs to the Rust Land & Lbr. Co.?

87 A. There.

Q. Been in cultivation for thirty or forty years?

A. Been in cultivation a good many years.

Q. Isn't that on the main land?

A. That's what they tell me it is.

Q. The stream isn't very far from that?

A. No sir, it is right on the east side of that.

Q. Why was it that the Rust Land & Lumber Co. filed a suit against McKee for that timber on the east side of that stream, between there and his plantation several years ago?

(Montgomery:) We object to that.

Q. There was a law suit of that kind wasn't there?

Defendant objects.

Court sustains the objection.

Plaintiff excepts.

Q. Isn't it true that you had a litigation with Mr. Miller about some of the land, cut on what we would call Section 6, understand?

A. I don't know anything about that.

Defendant objects to that.

Q. Now you claim, I believe, that these are accretions to Section 22 and 23?

A. That what it is, accretions to 22 and 23.

Q. Don't you know that all of Sections 22 and 23, and the corner, a large part of Sections 14 and 15 was washed off by the Mississippi River prior to 1848?

A. I don't know that.

Q. Well if it is true that the corner of the northwest corner of Section 6, which is on the west side of the Mississippi levee, that between that corner and Section 23, east boundary of Section 23, in Arkansas, as shown by survey of the Government, in 1815, is only about a quarter of a mile, do you know that?

A. I do not.

Q. Well if that is true, don't you know that the Mississippi river
88 bed big enough to have carried off the water of the Mississippi
River, after that survey was made in Arkansas by the Govern-
ment?

Defendant objects because it calls for an opinion of the witness.

(The Court:) I sustain the objection.

Plaintiff excepts.

Q. Now, you speak of this land from which the timber was cut,
of course, you know that that is an island, and has been all along
don't you?

A. Well, it was an island when I saw it, been an island ever since
I have been around there.

Q. Isn't it surrounded by what you call Old River, on the south?

A. On the south.

Q. And Dustin Pond on the north?

A. No.

Q. And west?

A. No, Dustin Pond don't come on the north.

Q. I am talking about the lands from which the timber was cut?

A. Where the timber was cut.

Q. Yes?

A. It was between Dustin Pond and Old River.

Q. And Old River, alright, then on the east, a stream from
Dustin Pond in a loop, extended around, and joined on to what
you called Old River, that's true too isn't it?

A. Dustin Pond joins on to Old River.

Q. At that end too?

A. Not on that end.

Q. At the east end?

A. No, not on the east end, but it does on the west end.

Q. Referring to this map?

A. Well, I don't know anything about that map, I know some-
thing about Dustin Pond.

Q. Well, I want to call your attention to the location of points
on that map, so this particular blue line here represents what
89 you call Old River, what is marked Pecan Lake?

A. Yes.

Q. And the upper stream represents Dustin Pond?

A. Very well.

Q. The map shows the drainage of Dustin Pond and the drainage
of Old River, or Pecan Lake, running out in the direction of one
another, doesn't it?

A. No it don't, this one here springs off here, while the other
one springs off there, one to the west while the other one northeast,
and then northwest.

Q. You say that there isn't a bayou that had water in it, holding
water all the time that runs around from Dustin Pond to Pecan
Lake at the east end?

A. I never saw it that way, never did.

Q. Are you prepared to say that isn't true?

A. I am, I never saw it this way, I went across this stream all right, that is a little willow slough there, but I never crossed it here.

Q. You never crossed it?

A. Never did.

Q. Now, I want you to look on this map, taking that to be correct, the correct location of Pecan Lake and Dustin Pond exactly where the nearest cultivated land that you say that the Rust Land & Lumber Co. owns?

A. Right in here.

Q. Take a pencil now and mark that, you see there is Section 22, now mark with reference to that, where it is, now put your initial in there—well put a star, make a star in the middle of that?

A. I marked field there for him.

Q. I will ask the witness to mark that so it can be seen?

A. I did.

Q. He put a round mark there, but there is so many on the map that you can't tell which it is, I asked him to make a star there and he refuses to do it?

(The Court:) Make some distinguishing mark.

90 A. Now, that little old field.

Q. Alright sir, now you have made a star, have a star there, that represents the point where you say the plum orchard is?

A. That's where I figure the plum orchard is, now that may not be just right, but I figure it is there.

Q. About how far is it from Dustin Pond?

A. Well, just about forty or sixty rods, I should judge, west of Dustin Pond.

Q. How far is it from that little fork in Dustin Pond, where that little willow slough that you spoke of came out?

A. Well, I can't tell, I never noticed that, possibly a little less than a half mile.

Q. Then, you mean to say that Dustin Pond runs higher up than is shown on the map?

A. Dustin Pond don't run as far as that is there, alright for me.

Q. Doesn't it run further north?

A. Yes sir, I think it extends possibly further north; I never paid much attention to it.

Q. And the northern end of it is closer to that field you spoke of?

A. No, the north end of that field would be about the same distance I think, a little further away, turn northwest.

Q. If it is about a half a mile from this fork here, it would be a quarter of a mile from that end, as shown on the map, wouldn't it?

A. No, it is not a quarter of a mile, it is less than a quarter of a mile, this field, might not have put this just right there.

Q. Is that plum orchard in cultivation?

A. No sir.

Q. You have never known it to be in cultivation?

A. I never have.

Q. Just a little plum orchard?

A. Yes sir, there is some little plums on there.

91 Q. Don't you know that the Indians planted this plum orchard?

A. No, I don't know anything about that.

Q. You don't know then whose plum orchard it was really?

A. I don't, I know that I have eat some of the plums off of the trees there, I don't know who grewed them?

Q. Now, where is the other field that you were talking about, locate it by marking another star?

A. Well, now, there is one in a big field there, up in here, and here, right close to a little bayou, I should judge now, I don't know anything about this map, but I know—

Q. Well, go by the Sections there, 10 and 11.

A. It would be located in 10 and 11 provided, I suppose you carry that line from Arkansas, now I run that in there and might have brought it in 14, I don't know, I wasn't looking for lines on that island.

Q. That is the other you locate on 15?

A. Yes sir.

Q. Is that or not in cultivation, the one in 15?

A. Yes sir, all of that big field is in cultivation.

Q. Now, that is on high land, isn't it?

A. Yes sir.

Q. That is on the original Arkansas territory, original timber around there?

A. Well, it is my understanding it is.

Q. And never was in the bed of the river, where that field is?

A. No sir, I don't think it was.

Q. Well, I want your opinion about it from the appearance of trees?

A. From the appearance of trees, I don't think it was.

Q. I believe you stated that the land between Dustin Pond and Old River where they unite at the north end was cane, ridge high land?

A. I did not.

Q. Didn't you state that?

A. I did not, that is a low swag, swamped land.

Q. Where was it that you put that high land yesterday
92 when you?

A. I put it up here.

Q. Up there on the island?

A. Yes sir.

Q. Up there on the island?

A. Yes sir.

Q. Now did you ever follow the course of Pecan Lake, towards the north?

A. I did.

Q. Does it come out into the Mississippi River, extend all the way up?

A. Yes sir, the water doesn't and the water goes up within a few rods of the township line between 28 and 29, grows up into willows then about, a little over, about a half a mile, a little less than a half a mile, I think that that would be about the distance, then we get a narrow channel, which is made up, and there is water in there, the banks are from all the way from ten to fifteen feet deep, and there is a narrow channel that leads out to the present Mississippi River, from the end of this pond.

Q. Water in it?

A. Yes sir.

Q. But, that is not connected with Old River?

A. The water isn't in low water.

Q. It is filled up?

A. It is filled up, it is sandy.

Q. Isn't there a lot of low depressions and bayous etc. between that and the Arkansas shore, all along in that accretion land?

A. Well, not after you get north of the lake, but after you get north of this water—

Q. North of what, north of the Range line?

A. Yes sir.

Q. North of Range 5?

A. Not, Range, but township line, and you go north of the township line, then there aint only about the width of the Old River, where you get high bank, that is middling high, I would
93 say probably six or seven feet high, somewhere's along there, which I would take to be the old Arkansas shore.

Q. Well, now, above that and above Dustin Pond up to the Mississippi River, that accretion land in there, isn't it very low and flat?

A. That is low land, very low flat.

Q. Small timber?

A. Well the timber varies, different sizes.

Q. Willow growing in there?

A. Some willows right at the edge of the water, way back, and then get into cottonwood.

Q. That seems then to have been the last land that was filled up doesn't it from appearance?

A. Next to this water, it does, to be the last land that was filled up.

Q. From that township line on up to the Mississippi River in that accretion land seems to be the last that was filled up, the timber is small.

A. The timber isn't smaller than any part of this; in fact, it is larger.

Q. You have just stated it was very small timber?

A. Right along the water's edge, and in the channel in here.

Q. Well, in the bed of the Old River on the west side of the island after going north of Dustin Pond?

A. Yes sir.

Q. Considerably north of that to the Mississippi River, isn't that there low land in there and very small timber?

A. It is not as large timber after you get up there three quarters of a mile going north with the river.

Q. From Dustin Pond, three quarters of a mile then, it is large timber again?

A. Large timber.

Q. But, there is a low place in there?

A. There are long willows just as you go out to the end of the lake.

94 Q. Well, I mean all of that accretion in there, that accretion land?

A. Well, that is not, that is good timber.

Q. Isn't that very scattering, and very small timber in there?

A. No sir, it is not, it is good timber.

Q. Why did you say a little while ago, it was small?

A. Right down here I told you, but when you, go out to the Mississippi River.

Q. I am talking about three quarters of a mile?

A. Three quarters of a mile from here.

Q. Yes?

A. Yes sir, that is al- right, right along the edge of the river.

Q. Lowland?

A. Not lowland, that is made up today by sand, but the timber is a little small on there, right in the channel of where the old river used to be.

Q. Do you know the way that was filled up?

A. I do not.

Q. Do you know whether that was filled up or not, when this cut-off was made in 1848?

A. I dont' know anything about it, it was that way when I saw it.

Q. Is there any way for you to tell?

A. No sir.

Q. No man knows?

A. I won't say about that, I know I don't.

Q. I show you a township map of Township 28, Range 4 West, in the State of Mississippi, and call your attention to a body of water marked "Mud Lake" to the west of Section 6, and north and west of Section 7, and to a strip of land on the west border of Mud Lake, and then beyond that, marked "Mississippi River" do you know anything about that Mud Lake?

A. I do not.

Q. What is the usual width of the Mississippi River?

95 A. Well, that is a pretty hard question for me to answer, they call it all kinds of ways, I expect it is, I expect at different points I never triangulated the Mississippi River, I never measured it.

Q. Isn't it usually three-quarters of a mile, to a wide mile?

A. That is the ordinary opinion of the people, but there is a whole lots like me, don't know.

Q. Did you ever see the Mississippi River as narrow as a half a mile from high bank to high bank?

Defendant objects to that.

(The Court:- I overrule the objection.

Defendant excepts.

A. You asked me if I ever saw the Mississippi half a mile from high bank to highbank?

Q. As narrow as a half a mile from high bank to high bank in this part of the country?

A. No, I don't think I did from high bank to high bank.

Q. It wouldn't be large enough if it was that narrow, to carry off the water, in your opinion?

A. I don't think it would, I don't know though.

Q. The land in controversy and all of the Horseshoe Island is west of Mud Lake as shown on this township map, isn't it?

A. Well, I should judge to be north, and some of it east, that line, that would be my opinion, that range line, it would go right through that island.

Q. The range line would go right through that island?

A. Yes sir..

Q. Well, let's refer to the survey of the Arkansas shore and see about that, this is the range line, isn't it?

A. Well, I don't know, I can't tell on that map, that ain't much of a map.

Q. Well, you know the range line that, do you mean the range line or the township line?

A. I mean the range line, you show me something of the range line, and township line both there I don't know which you want me to answer.

96 & 97 Q. You spoke about the range line?

A. Here is the range line and here is the township line.

Q. Range line is to the west of Sections 7, that would go through it al- right you say?

A. Yes sir.

Q. Extending north would go through the island?

A. That's my impression.

(Maynard:) Now, I want to introduce this township plat, in reference to the questions we have propounded to the witness.

(Montgomery:) Let that go in for the present, and a certified copy can be substituted; I have no objection.

The said township plat referred to is by the stenographer marked Exhibit No. 2 and the same is in words and figures following:

98 Q. Now, I call your attention to the township map, of township 28, Range 5 West, in Mississippi, showing a survey made by the Government in 1853, and 1833, now, you will notice on that map a forked stream to the west of the Mississippi River running through Section 3, and Section 10, and uniting on Section 10, and flowing south through Section 15 into a big Cypress swamp, did you ever go over that part of the territory?

A. Is this in 28?

Q. Yes, 28, 5?

A. Yes sir, I have been in Section 3.

Q. Section 3 and Section 10, now isn't it a fact that your Old River, or Pecan Lake has cut through into the east branch of the stream I have mentioned?

A. No, and don't show it.

Q. And has run north up that stream?

A. Don't show anything of that sort.

Q. Isn't it so located on the map exactly where this is located?

A. No sir.

Q. That stream, is that stream still there running through Section 3, or is it now in the bed of the river?

A. I can't tell you that, but I know there is big cane break-s all along there.

Q. A big cane ridge where?

A. All along here.

Q. From all up in 3, both banks of the stream?

A. Clean up to the t-ship line.

Q. In Section 3?

A. Yes sir.

Q. Township 28, Range 5?

A. Yes sir.

Q. On both sides of the stream high cane land?

A. On both sides of the stream, I don't know what you call the both sides of the stream.

Q. East and west side?

A. I never seen anything of this cane, might have been filled up.

99 & 100 Q. I thought you said that it was there?

A. I did not.

Q. Where is it?

A. I don't know where it is.

Q. What did you say so for?

A. I don't say that I did.

Q. You didn't say that in Section 3 was high timber on both sides?

A. I said it was high cane, right along this land in here.

Q. Then it is high cane along in the southeast quarter and the northwest quarter of Section 3, is high cane?

A. In the southeast quarter of Section 3, there is high cane all along that old river.

Q. High land, original land?

A. Yes.

Q. Shows it is original land?

A. Yes sir, I call it.

(Maynard:) I introduce that township plat, the same being by the stenographer marked Exhibit 3.

The said township plat is in words and figures following, to-wit:

101 Q. How far is the original land of Horseshoe Island, Arkansas *Island* from the north end of Dustin Pond?

A. Well, the north end of Dustin Pond, it is not very far, no, it wouldn't be over a quarter of a mile any way.

Q. Well if the north end of Dustin Pond ends midway at the quarter section post of Section 22, extended, then how far do you say it is to the main land of Arkansas?

A. I just told you, I just answered that question, I don't think it is over a quarter of a mile.

Q. Don't know exactly how far Dustin Pond ought to be extended on this map north, you know, and so I will ask you with reference to a particular point from the quarter section corner of 22, how far north is it?

A. I haven't got any particular pond to answer from Dustin Pond.

Q. Doesn't the map show, and I mean by map, the survey of the United States Government, that from the quarter section post of 22 extended on the west boundary line of 22, extended to join the point of 22 this is old original territory, that it is a half a mile?

A. I don't think it is that far, I don't think it is a half a mile.

Q. Does it show here?

A. I don't think it is over a quarter of a mile, if it is that.

Q. Well if that point of 22 washed away, and the original territory is higher up than what this original Government map shows to be now, then you are mistaken about how far it is, ain't you?

A. Well, I don't know anything about that, I give you my opinion on the distance from the end of Dustin Pond to that high land.

Q. Now, don't you know that along the south borders of Section-22 and 23 in that accretion land, that there is a low depression and stream now?

A. No I don't.

Q. And that it is very small timber in there?

102 A. I do not, it is good timber in there, that is taking the evidence.

Q. You mean to say that that is as high as the land around Dustin Pond that is in controversy?

A. It is higher.

Q. It is higher?

A. It is higher.

Q. And how far down does that extend, that high land?

A. It extends down in here.

Q. All of the way down below the plum orchard, how far below the plum orchard?

A. Oh about twenty rods.

Q. When were you over that land?

A. I was over that land last week.

Q. Over all of it?

A. No, not all of it, but I have been over that part.

Q. Did you walk around that to see whether or not that was high or low?

A. I know all about that, I didn't have to walk that to find that out.

Q. Don't you know you can't get, go through there in the winter, without bogging up?

A. Oh, I have been there in the Winter and Summer both too, I have been there with boats and canoes and all kinds of shapes.

Q. Is the ground very damp in there?

A. Oh yes, it may be damp, everytime you get a lot of rain.

Q. Swamp lands?

A. Oh no.

Q. No swamp lands?

A. Oh no, you have got to get down South towards the river bank on this old river before you get to the low lands.

Q. Don't find any in here either?

A. That is high, up pretty high around there, clean to the Mississippi River.

103 Redirect examination:

Q. Counsel asked you about that field around the plum orchard, do you know who built the fence around the plum orchard?

A. Why, I don't know as I do, now I think, Mr. Hoffman though built the fence around this field.

Plaintiff objects.

Court sustains the objection.

Defendant excepts.

Q. Do you know who built that fence and keeps it up, keeps it in repair?

A. No, no one does.

Q. Is it a complete fence now, all around it, the main orchard or not?

A. Some part of it is down, and other parts stand there with an old wire in it.

Q. The counsel asked you about the certified plat of the Government surveys of 32 of Mississippi, of Township 28, Range 5, this plat now, the head of the map is north, now here is the Mississippi River, what is the difference between the traverse of the banks of the Mississippi River, the course of it as shown on that Government map and the traverse of the south bank of the present Old River, that you spoke of?

A. Well, I couldn't tell any difference.

Q. I mean as to shape?

A. That is as to shape, that is the shape I find the Old River in today.

Q. Counsel asked you, Mr. De Chau, about whether the place where the—

(Mr. Maynard:) I would like to ask one or two more questions I overlooked.

(Montgomery:) Certainly.

Cross-examination:

Q. You spoke about the cutting of some overgrown timber on this land in controversy by the Rust Land & Timber Co., did you see that cut?

A. The down timber, the timber that was down.

Q. Yes?

104 A. I did.

Q. Did you see it cut?

A. Seen it cut after it was cut, and scaled the timber after it was floated out.

Q. When was that cut?

A. Cut about six years ago, five years ago we cut some.

Q. Whereabouts?

A. Well now, there was no particular spot, we simply went on this island there, and whenever we found a down tree, we cut it.

Q. Didn't cut it between Dustin Pond and Old River where this timber was cut?

A. We cut and floated, yes sir, right there, Charley Sherman run the float over.

Q. Did you cut any on this land where the timber was cut?

A. Well, I didn't look at that little corner, my men and I did the rest of it.

Q. You don't know then?

A. No, sir, I don't.

Redirect examination continued:

Q. Did you cut any between Dustin Pond and Old River?

A. We did.

Q. You didn't cut the same trees that they cut this time?

A. No, perhaps, we didn't cut anything but what timber had fallen by wind.

Q. Counsel asked you whether the land between Old River and Dustin Pond was an island or not, I don't exactly understand your answer to that question, whether the land between Old River and Dustin Pond is an island where this timber is cut?

A. It is not an island today.

Q. Has it, or not, ever been an island since you knew it?

A. Not since I knew it.

A. What about this little small stream that runs into Dustin Pond up towards the west?

105 A. It is simply a little low swag runs in there, with small willows, about twenty feet wide.

Q. How long is it?

A. It runs right out, I never crossed anywheres else except—

Q. Does it or not run into Old River, that little small stream?

A. No sir.

Q. Does it come out of Old River or not?

A. I couldn't say that, I never saw any stream after I left Dustin Pond?

Q. What connection has that little wash out stream with Old River?

A. None whatever.

G. W. CALHOUN, a witness introduced for and on behalf of the defendant, having been first duly sworn, testified as follows, to-wit:

Q. What is your profession?

A. Land surveyor.

Q. How long have you been engaged in that profession?

A. Eleven years.

Q. Have you made any surveys in this part of the country?

A. Yes sir.

Q. Did you make any surveys for the Rust Land & Lumber Company of the lands in controversy in this suit, or that neighborhood?

A. I did.

Q. State to the Court and jury what you did in connection with the making of a survey, who was with you, and what lines you run, what field notes you followed, you followed the Government field notes did you in 1833?

A. I did.

Q. What lines did you run?

A. I run the lines of Section 11 and 12 and 3, Town. 28, N. Range 5 West.

Q. Have you finished stating the lines you ran in that survey?

A. No, I ran a meandering line on the south bank of what is now Old River, and other lines.

106 Q. Anything else?

A. I ran the line around the timber that had been cut north of Old River.

Q. Anything else?

A. I made certain other measurements, etc.

Q. Now, Mr. Calhoun, I ask you first who was with you when you made that survey?

A. Mr. De Shau, and Mr. Schlierholz.

Q. Mr. Schlierholz sitting right there?

A. Mr. Schlierholz helped us.

Q. Did you ever see this map before that I hand you?

A. Yes sir.

Q. Who made that map?

A. Mr. Schlierholz.

Q. Was that map made from your survey?

A. It was.

Q. Does that map accurately represent the lines run by you?

A. It accurately represents that portion of the line run by me.

Q. As many of the lines run by you as are on that map, are they correctly represented on that map?

A. They are.

Q. Who made the map did you say?

A. Mr. Schlierholz.

Q. Did you see it made?

A. Yes sir.

Q. Did you furnish him your notes to make it from?

A. I did.

(Armstrong:) We offer this map.

(Fitzgerald:) We object to the introduction of this map for the reason that it attempts to delineate first by a red line the noted, probable Arkansas Shore in 1833; another thing it attempts to do is to outline from one end of the map to the other the old channel of the river, and it doesn't state in there at what date this channel of

the river was,—it was the channel or whether it was the channel of the river at the time that cut-off, or whether it is the channel of the river after or before the cut-off; and we say he might testify in his testimony as to where he thought a channel of the river located, but he has no right to present a map here, showing a probable shore line of Arkansas. We are not trying this case on probabilities.

(The Court:) I overrule the objection.
Plaintiff excepts.

Q. Now, Mr. Calhoun, take that map and show on it, show the first, the lines you ran and the measurements you made?

A. I run the south line of Section- 11 and 12.

(Fitzgerald:) At the same time, I desire to make another objection to that map; 3d. That the map wasn't made by the surveyor, but it was made by an attorney in the case, who didn't run the lines himself.

(The Court:) I overrule the objection.
Plaintiff excepts.

Q. Now, Mr. Calhoun, show on the map what lines you ran and what measurements you made?

A. I ran the south line of Section- 11 and 12, east line of Section 12, up to what is now Old River, the center line of Section 12, up to what is now Old River, the lines between Section- 11 and 12, the center line of Section 11, up to what is now Old River, the west line of Section 11, up to what is now Old River; then I traversed the west bank of what is now Old River up to the north line of Section 10 to a post quarter of a mile west to where the corner to Section- 2, 3, 10 and 11 would be in Old River; traversed the west bank of what is now Old River through Section 3 north; the lines of Sections 2 and 3 and continued north to the south line of Section 35; ran the line between Section 35 and Section 2 West to the Government corner to Sections 2, 3, 34 and 35; ran what would be the north line of Section 11 east to a point at the northeast corner of where the timber was cut on the north side of Old River.

Q. What indicates on the map the place where the timber was cut?

108 A. The red portion marked "An area of 27 acres."

Q. What is the width of Old River here?

A. Average width is 850 feet.

Q. Do you know the depth?

A. The depth is from 8 to 19 feet.

Q. What is the distance from this bank of Old River to Dustin Pond, across the place where the timber was cut?

A. Three-eighths of a mile, approximately.

Q. Now, if you follow out, what direction is that?

A. This, north.

Q. If you follow out north from Old River to the present channel of the Mississippi River?

A. I walked from the head of the water in what is now the north-west and into the Old River, Mississippi River, following the channel.

Q. I will ask you what indications there exist there of any channel?

A. There is a channel there that is very much in the shape of a bayou, an average width of a hundred feet and depth of 18 to 20 feet high banks.

Q. What is the heights of the banks on that south side of Old River opposite the place where the timber was cut?

A. Average height, I should say, would be 8 to 10 feet.

Q. How far out did you follow this channel, north from the head of Old River, did you go to the present Mississippi River?

A. I did.

Q. Is or not the channel well defined all of the way to the present Mississippi River?

A. Well defined with the exception of quarter of a mile which is filled up in the shape of a sand-bar.

Q. Between the north end of that sand-bar and the present channel of the Mississippi River what about whether or not the channel is well defined?

A. Well defined, 15 to 18 feet deep, and had water in it about half of the distance.

109 Q. Now, going around the other way and going north to the present channel of the Mississippi River, did you make any observations in regard to that channel?

A. For a certain distance only.

Q. How far?

A. I should say about a mile north of where the water stops in the northeast end of Old River.

Q. Point out on that map the point where the water stops on the northeast end of Old River?

A. I can't point that out exactly.

Q. Have you any idea where that is on the map?

A. Close to the line between Sections 31 and 36.

Q. Point out on the map how much further north of that you found that channel out?

A. I didn't follow that channel north of that.

Q. Now, did you go over this country between Dustin Pond and Old River?

A. I did.

Q. Is there any difference between the size of the timber going south from the south edge of Dustin Pond to the north line of Old River?

A. There is.

Q. State what difference there is? And how the timber varies, if it does vary?

A. Going north, from the north side of what is now Old River, the timber increases in size and age until you get to Dustin Pond.

Q. Can you state the average size of the timber down here on that north bank of Old River, you know about how that timber runs?

A. Eleven to twenty-four inches.

Q. How did it vary going up to the south edge of Dustin Pond?

A. It is larger.

Q. Now going around here, at the northeast end of Dustin Pond, that is, isn't it, that the northeast end of it?

110 A. Northeast end.

Q. What about the size of the timber immediately east of that point?

A. It is large.

Q. What kind of timber is it?

A. Cottonwood timber principally.

Q. Are you familiar with the ages of timber, — you any way of judging the age of timber?

A. Yes.

Q. Had experience of that kind?

A. Yes sir.

Q. What experience have you had?

A. Well, I have made it a study, I have cut into a great many trees to find the original figures put in there when the Government surveyors made and noticed the amount of growth, and noted the number of years cut in there, etc.

Q. You think you are able to tell with a reasonable degree of accuracy the age of timber by observing it?

A. I am.

Q. What would you say the age of the timber there immediately east of a little northeast of that Dustin Pond?

A. Not less than 75 years.

Q. Is that older or younger, or the same age of the timber between Dustin Pond and Old River across the place where this timber was cut?

A. It is smaller in size and older, the timber here is larger in size and older than it is between Dustin Pond and Old River.

Q. You say here, and point to a point immediately east of the northeast corner of Dustin Pond, is that correct?

A. Yes.

Q. Now, on your map, Dustin Pond is indicated as coming to an end at that northeast point, is that the way the conditions
111 actually exist there, is that the end of Dustin Pond?

A. That is the end of Dustin Pond, yes, that is the end of it.

Q. Now, is there or not any body of water connecting this northeast end of Dustin Pond with the channel of Old River?

A. There is not.

Q. Excepting the connection at the northwest side of Dustin Pond with Old River, is there any other water connection between Dustin Pond and the channel of Old River?

A. None.

Q. In measuring the depth of the water in Old River, nearer which bank in there is the deeper water?

A. The deepest water is about one-third from the Mississippi bank.

Q. You say the Mississippi bank, you mean by that the south bank.

A. Yes, sir.

Q. Did you find a line where the Mississippi shore of the river was according to the Government field notes of the survey of 1833?

A. I located it where the line should be, measuring from the south bound-ry of a section.

Q. How is that indicated on your map?

A. Indicated by red line, marked "Mississippi Shore in '33."

Q. River line, survey of '33 Mississippi shore, that what you refer to?

A. Yes, sir.

Q. Now, Mr. Calhoun, take that map and read the map, that is, explain the various lines on it, and the tinted space and what they represent in connection with this body of land, point out the various channels and the fields and other lines that you located, show how they are represented on the map?

A. According to the survey made on the Mississippi side, the Government in '33, they gave two fractional sections—the blue space on north side of the map represents the Mississippi River as it is today; these portions shown in yellow tint, represent fields as they are today; the blue tinted spaces running south and west and north around what is now Horseshoe Island, represent the present indications of what is left of the old channel of the Mississippi River; that portion shown as Section- 11 and 12 south of what is marked old channel, or fractional, let me see, read that,—is what is left of those two fractional sections, after the ceasing of caving of the Mississippi shore, caused by the cutting off of 1848. The small space on the north side of Old River, tinted in red, and marked as being 27 acres is where the timber was cut, that is enough of the physical features of the map.

Q. Describe the red lines and black lines?

A. The red line running along the west side of what is marked as the Mississippi River in '33 southward entering Old River, passing through what is now Old River, and going out at the southeast side is the bank of the Mississippi River as it was meandered in the Government survey of '33, and the dotted line drawn parallel with it is what would have been then the probable Arkansas bank.

(Maynard:) Now, where did you get the data for that?

A. Well, the Mississippi River is pretty much the same.

Q. The data for the probable Arkansas bank?

A. I got it out of the Government field notes. Dotted line, parallel line of the water just described.

Q. I believe I asked you, if I did, you needn't answer it again, what part of the channel of the Old River is the deepest?

A. You asked me that once.

Q. And you say about a third of the Mississippi from the south bank?

A. About a third.

Q. Now what is the nature of the depth of the channel from that deepest portion towards the north bank, the other two-thirds of the way that is?

A. Gradually becomes shallower to the north side.

113 Q. What is the nature of the two banks of Old River, the south bank and the north bank, which is the higher?

A. One is higher and one is lower, the south bank is the higher one.

Q. How high is the south bank?

A. Eight to ten feet.

Q. What is the nature of the north bank?

A. It is very low and marshy and wet.

Q. How far from the south bank is the deep water in the channel of Old River begin?

A. About 300 feet would be the deepest point of the south bank on an average.

Q. I don't mean the deepest portion of the channel, I mean how far from the south bank does the water begin to have any considerable depth, is there deep water close to the bank or not?

A. Deep water close to the bank, yes.

Q. And how about the north bank?

A. The north bank is very shallow.

Q. And gradually gets deeper as you go to the south bank, is that correct?

A. That is true.

Cross-examination:

Q. Where do you live, Mr. Calhoun?

A. Memphis, Tenn.

Q. Are you in the employ of the Rust Land & Lumber Company?

A. I am.

Q. How long have you been in their employ?

A. About two weeks.

Q. Were you generally employed by them?

A. No.

Q. Do you do surveying in this part of the country often, have you been down here very often?

A. Yes, sir.

Q. When did you make this survey?

A. I made it from the 18th to the 22d, of this past month.

114 Q. On this past month from the 18th to the 22d?

A. Yes, and I worked a couple of days since.

Q. On the map?

A. No, on the ground.

Q. You were down there on the ground four days?

A. Yes, sir.

Q. And then you have worked two days since you drew the map, or since you made the survey?

A. I was on the ground five days, I have been on the ground two days since.

Q. That makes seven days?

A. Yes, sir.

Q. Now, in regard to you there, you say you ran the traverse of the Old Mississippi River as it was in '33, this red line that you have got there?

A. No, not that portion of it.

Q. You didn't run that traverse?

A. Not that portion of it.

Q. You only ran a portion of it in front of Section 11?

A. I didn't run that, I just located it, it is in the lake.

Q. You didn't run this traverse at all?

A. I did not.

Q. You put that on there?

A. Went on there from the Government plats, made in '33.

Q. What Government plats, where did you get them?

A. Why copy was furnished to me.

Q. By whom?

A. By Mr. Schlierholz.

Q. By the Rust Land & Lumber Company?

A. Yes.

Q. Now, did you run this field line in here?

A. I did not.

Q. You didn't run that?

A. No, sir.

Q. According to the scale of your map, how many acres have you got in cultivation in this field?

115 A. About a hundred and sixty.

Q. About a hundred and sixty acres in cultivation, it covers practically the east half doesn't it? I mean the east half doesn't it of Section 10, doesn't it, in the State of Arkansas?

A. No, sir.

Q. I will ask you if it covers practically the east half of eleven?

A. No, sir.

Q. Isn't this the line of eleven?

A. No, sir, each one of these squares is only a quarter of a section.

Q. Shows there is 160 acres in this field?

A. Approximately.

Q. You call this an old field?

A. That is.

Q. What sort?

A. Just an old field grown up in bushes?

Q. Do you know whether it is a field, or pasture?

A. I don't know what it was, it's an old clearing.

Q. Now down here represents said plum orchard field?

A. Yes, sir.

Q. What makes you call it a field?

A. A cleared space.

Q. You call all——

A. Fair fence is around them.

Q. Doesn't make any difference whether it has been in cultivation or not, it is a field?

A. Well, that's the way I designate.

Q. Any cleared space is a field?

A. Yes, sir.

Q. You say there is a fence around that now?

A. There is, a portion of it.

Q. Did you walk all around through here?

A. I did, yes, sir.

Q. All through there?

116 A. Not between those two points.

Q. That is, between Section 22 and 23, now did you walk through there?

A. I walked over all that territory between Dustin Pond and Old River, and in south of this field, and the north bank of the lake.

Q. But, you didn't walk directly below Section 22 and 23?

A. I did, yes, I did.

Q. You walked down the point of 22 where you have the word shore 16?

A. I walked south.

Q. Now, did you run that traverse there of the shore in '16?

A. I did not.

Q. You didn't?

A. No sir.

Q. How did you manage to run that from, did you manage to mark that on your map?

A. Put on there with the Government township plats where they show it.

Q. How could you tell where this shore of '16 was from the Government maps without triangulating the river and making the crossing here?

A. Well, there has been surveys made on the Mississippi side.

Q. Who made them?

A. Mr. Fitzhugh, I believe.

Q. Did you make your map from Fitzhugh's survey?

A. I did not.

Q. Where did you get that?

A. They are located on there in an approximate manner only.

Q. This is located approximately?

A. Yes sir.

Q. And not absolutely correct?

A. Not by actual survey.

Q. So, you have drawn lines on here, and designated them as original shore on both Arkansas in '16 and Mississippi in '33
117 by a survey made by Fitzhugh, or by some Government map furnished you by the Rust Land & Lumber Company?

A. No, I have evidence other than that, because I have walked over this territory, not ridden, crossed to there up here, and I know

the approximate distance, and I located this field from other evidence besides what was furnished to me in that manner.

Q. Now tell, Mr. Calhoun, as a surveyor, is it possible for you to locate the shore of Arkansas in '16 accurately without triangulating the river, and getting a known Government point?

A. Certainly not.

Q. As shown in 1816?

A. Certainly not.

Q. So, you certainly did that approximately?

A. Approximately.

Q. Then, where did you find any corner in here?

A. I didn't find any.

Q. You didn't find any corner there?

A. No sir.

Q. Then the whole of that portion that you have marked island, and Arkansas shore in '16 is approximate?

A. It is approximate.

Q. Now, you say that Old River channel here, you have got marked Old River channel, center of the channel in '48, what made you mark that the center of the channel in '48?

A. Didn't mark it that way.

Q. Who marked it?

A. Mr. Schlierholz.

Q. Do you concur in that?

A. Well that's a point which I don't know.

Q. Now it isn't possible, Mr. Calhoun, in all fairness to you and I both, for you to say where that channel was in '48, you can say perhaps there is an old channel there and perhaps there is an old channel there in '57 or '33 or '65 but, there is absolutely no way for you to tell where that channel of the river was in '48?

118 A. Well, it has certain physical conditions.

Q. Well, could you tell whether that was there '48 or '57?

A. Take into consideration all of the physical conditions, come pretty close to it.

Q. What could you take into consideration to say that was there in '48?

A. What was there?

Q. This channel in '48, I am not speaking of '49 or '47, I am talking about '48?

A. At that point, I am not familiar with the physical conditions.

Q. At any point again in '48?

A. Well, I can on this south side here.

Q. In '48?

A. Judging by the growth of the timber.

Q. Well now, listen, you were in the court-room here yesterday when you heard Charlie McGehee testify that the levee broke right here in '47, in '57 and washed into a cypress brake here?

A. Yes sir.

Q. And that that made Pecan Lake, are you able to get on the stand and testify that that isn't the truth?

A. Well the facts don't justify his stating it, I don't think, according to my opinion.

Q. I understand, but are you able to swear that that isn't true, just from your idea, now in '57, I speak of?

A. I don't see how it could be possibly the truth when the Government line of the survey of '37 runs down to what is now present Old River.

Q. But, doesn't Pecan Lake, run on this side of the Government line; so in '33 Pecan Lake wasn't there, the river didn't run there did it?

A. In '33.

Q. Yes?

A. Didn't run south of this red line.

Q. It didn't run where Pecan Lake is now, did it?

119 A. No.

Q. Well, doesn't the Government map show, the certified copies of the Government maps of Section 11, of Town. 28, R. 5 show that there was a piece of land between what is now known as Pecan Lake and the original shore line?

A. Didn't show Pecan Lake at all.

Q. It shows a cypress brake there doesn't it?

A. No sir.

Q. It doesn't? I am speaking of here, don't this map here, between the shore line here and what you found to be Pecan Lake, now isn't there a strip of land, wouldn't there be a strip of land between that and the 1833 survey?

A. I don't just catch the question.

Q. Where you find Pecan Lake now?

A. Yes sir.

Q. And where you find the river shore line '33?

A. Yes.

Q. If accurately surveyed?

A. Yes.

Q. Wouldn't there be a strip of land between Pecan Lake and the old '33 survey?

A. No.

Q. There would not be any land in there at all?

A. No.

Q. So then——

A. Not at that point.

Q. Well, anywhere in that, in here, in front of Section 11, anywhere in front of Section 11, wasn't there a strip of land in there?

A. There would be one acre right here, that's the only point.

Q. Wouldn't be any strip of land in here?

A. None whatever.

Q. Now, I am not going to introduce this map; I am just going to ask him a question, if that shows the original shore line of the Mississippi River, and shows these across in here, between the original shore line and this place here, that's is not correct is it?

120

A. My map is made from actual survey work done in the last two weeks, it is correct.

Q. I understand, I say if this shows land in between what is now Pecan Lake and what was once the original shore line of the State of Mississippi in '33, that map isn't correct that far?

(Montgomery:) We object to that question, because it calls for the expression of an opinion, about a paper not introduced in evidence.

(The Court:) I overrule the objection.
Defendant excepts.

Q. Now Mr. Calhoun here in Mud Lake, have you got Mud Lake designated there, there was a strip of land, wasn't there between Mud Lake, and the old shore line, wasn't there?

A. Well, I would have to refer to the township plat.

Q. Well sir, do that, if you have it?

A. I haven't it.

Q. Now, was there a strip of land between Mud Lake and the Mississippi River?

A. Shown on this plat.

Q. There is some shown there?

A. Not marked though.

Q. Well, here is Mississippi River, isn't it?

A. Yes sir.

Q. Here is Mud Lake?

A. Yes sir.

Q. There wouldn't be any use to designate it, if there wasn't something between there?

A. According to that, there wouldn't.

Q. Now, I want to ask you another question here about this old channel that you got designated there, now this old channel, what made you state that it was in '48, center of the old channel in '48?

A. I don't state that.

Q. What made you have it put on the map?

121 A. I didn't have it put on the map.

Q. Well, did anybody put it on there?

A. Mr. Schlierholz made the map.

Q. Isn't it a fact, that you knew that you had to have a channel there in '48? And that that was the reason that you wanted to make a channel there?

(Montgomery:) We object:

(The Court:) I overrule the objection.

Defendant excepts.

Q. Mr. Calhoun, let me show you, you also found this played out, and there wasn't any water in here?

A. Well, I only saw it at one point, up here, there was a little water there, I saw it.

Q. You didn't go up there?

A. I didn't see it.

Q. Well you show that you have got your channel designated over there, don't you, in '48, haven't you?

A. I didn't designate it on there.

Q. So this map then isn't made from your survey?

A. That portion of it that has to do with the work that I did on the south end is made from my actual survey.

Q. Then only that land which is in controversy here, and is shown between Dustin Pond and Section- 11 and 12, is all of the actual work you did?

A. No, I rode and stepped over this portion all up through here?

Q. I am talking about a survey?

A. That's all.

Q. That's all of the actual survey you made?

A. That's all.

Q. So this map here, when it attempts to outline the channel around here in '48, and then attempts to delineate the channel to run clear around this way was simply made from somebody else's ideas about it?

A. Well, on the west side I have stepped it.

122 Q. But, you didn't survey it?

A. Well, I did a portion of it.

Q. Well, how far did you survey?

A. About three-eight-s of a mile north in Section 35.

Q. That would put you where, just above the section line, just below the quarter section line?

A. Just about there.

Q. Then, you don't know the condition from there on, except from just riding along?

A. That's all.

Q. And yet, it is designated on here, center of the old channel isn't it?

A. What is?

Q. This mark here, this channel that runs out northeast between Section 26, along the west edge of 30 and 35?

A. It is designated.

Q. "Old Channel"?

A. Yes sir.

Q. You didn't designate it that way, did you?

A. No sir.

Q. Now, about this timber in here, Mr. Calhoun, you walked all along in here?

A. I did.

Q. That is on the land in controversy?

A. I did.

Q. And between Section 22 and shown in 16 in Arkansas and Section 11 and 12, 28, 5, in Mississippi, now you say that you found that this plum orchard, around this plum orchard, very heavy timber?

A. There is heavy timber north of it, south of it, the timber decreases in size all of the way to the lake.

Q. Well now, will you tell me between, taking the center line

of Section 11, running north and crossing to Pecan Lake on the north bank of Pecan Lake, say a hundred feet back from the 123 shore, will you tell me what size the timber is there?

A. From eleven to twenty-four inches, I would judge a little further back probably, before you get to timber of that size, two hundred and fifty feet.

Q. You have got this marked on here "Trespass"?

A. Yes sir.

Q. Where did that trespass occur?

A. It is located in that position on the map.

Q. Did they start to cutting the timber there on that bank?

A. I don't know.

Q. You walked over it, didn't you?

A. I don't know where they started to cutting the timber.

Q. It is cut pretty close to the bank?

A. Yes sir.

Q. You heard the testimony of your man, De Shau, didn't you yesterday? That that timber was cut, was between 34 and 36 inches didn't you?

A. I believe I did.

Q. Of what size did he say?

A. I don't remember the exact size that he gave.

Q. So that timber in there was pretty big wasn't it, big enough for merchantable timber?

A. Well the timber that was cut, was the same character of the timber.

Q. You walked around through there?

A. Yes sir.

Q. It is all about the same character of timber, and it is all large cottonwood timber?

A. It is not what you call large cottonwood timber.

Q. Now, how do you tell the age of a tree Mr.——

A. There is no absolute way of telling?

Q. Why, I thought you said there was?

A. I have made a study of it.

Q. I thought you said you did?

A. I don't believe I did.

Q. What do you estimate by, the rings?

124 A. No, I estimate by size, and taking into consideration the place where it is growing. I cut into some cottonwood trees and know just exactly the number of years that they were marked and find original marks and know the amount that grows over it and made a close study of it.

Q. Of course, you know that cottonwood timber in different places will grow quicker and less thick than other places, now, you heard Mr. De Shau say yesterday that he had been in timber business for about 30 years?

A. Yes sir.

Q. You heard him say that he had cut the trees and counted the rings, and that there was no way of telling how——

A. He said there was no way of him telling, I believe.

Q. How long have you been surveying?

A. Sixteen years.

Q. And during that time, you haven't always surveyed in timber land, have you?

A. Principally.

Q. Haven't done any surveying in cleared land at all?

A. Oh yes sir, I have done the biggest portion——

Q. And you have always cut in to cottonwoods?

A. I have cut into all kinds of trees.

Q. And yet, you say, during your 16 years as a surveyor, you know more about cottonwood timber, than Mr. D Shau and he has made it a study?

A. I don't think so, I don't think I said that.

Q. Now look here on this map, taking up this old channel again, that's a sore point here with me, because I want to find out exactly what you think about it, this old channel that runs around here, you propose when the current came around here, to throw the current in on Section 12?

A. Throw the current naturally on the outside.

Q. That is Section 12, now would it *may* the shore then, do you know anything about the current of rivers?

A. Well, I know from observation, I have been working on the Mississippi River.

125 Q. For the 16 years——

A. —seen caving banks, etc.

Q. Do you mean if that channel hit in here, it would make the banks all the way in here?

A. Oh certainly not.

Q. You have got the middle of the channel in here?

A. I haven't got it there.

Q. You don't propose to be responsible for your map, for what the lawyers put on it, that right, what are those criss-cross marks up here, what is that, Friars Point?

A. Yes sir.

Q. You didn't run any lines up in there, did you?

A. No.

Q. Now, I notice that you said down here these high banks in here was caused by the cut-off of '48?

A. I don't think I said that.

Q. You didn't say that?

A. No sir.

Q. I notice there to that you have got marked on the map with a red dotted line probable Arkansas shore of '33, no Government map for Arkansas in '33 is there?

A. I think the Government survey was made before that in '15 or '16.

Q. There is no map of the Government to show any survey in '33 of Arkansas is there?

A. Not at that point, none that I know.

Redirect examination:

Q. Mr. Calhoun, Mr. Fitzgerald has asked you about the parts of the map that were put on there by Mr. Schlierholz that you didn't survey, now going back to all of the point which you did survey and which do appear upon the map were those points accurate, those lines correct?

A. They were from the work I did and riding and walking over it, it is approximately correct, the entire map.

Q. I am referring now to the part that you actually surveyed, asking if that is correctly delineated on the map drawn?

126 A. It is.

Q. What other work have you ever done for the Rust Land & Lumber Company except this survey?

A. None.

Q. What connection have you ever had with them before?

A. None whatever.

Q. Now, Mr. Fitzgerald asked you something in connection with what indications there were that this body of water, which he refers to as Pecan Lake wasn't caused by the breaking of the levee in '57, what are those physical indications?

A. Well, because in '33 when the Government survey was made the meandering line on the south side of the river fills in what is now Old River, or Pecan Lake, and it was a caving bank on the south side, and continued to do so until the cut off of '48 was made.

CHARLES A. M. SCHLIERHOLZ, a witness introduced for and on behalf of the defendant, having been first duly sworn, testified as follows, to-wit:

Q. Mr. Schlierholz, where do you live?

A. I now live in Alpina, Michigan, formerly I lived in St. Louis, Mo., up to four years ago.

Q. Are you acquainted with the young man who just testified, Mr. Calhoun?

A. I met him several weeks ago for the first time in my life.

Q. What connection has he with the Rust Land & Lumber Company?

A. None whatever; he was engaged by Mr. De Chau and myself to do the surveying.

Q. How long have you been connected with the Rust Land & Lumber Company?

A. About 10 years from the 7th day of February next.

Q. What is your profession, Mr. Schlierholz?

A. My original profession is civil engineering and surveyor, and I was admitted as an attorney also several years ago.

Q. General practitioner?

A. No, I never practiced, I made land law my specialty.

Q. What is the office that you hold with the Rust Land & Lumber Company?

127 A. I am the land man of the Rust Land & Lumber Company, Free States, and Gilchrist States.

Q. What are your duties in that office?

A. I look after all land titles, examine all for purchase, look after all law suited, and attend to them relative to straightening out titles, payment of taxes, assessments, anything pertaining to land matters.

Q. What have you to do with reference to investigations of litigated matters relating to their land and timber?

A. I confer with the attorneys and work up the cases and assist in the matters.

Q. Do you or not make investigations as to the circumstances and the physical conditions and the lines yourself?

A. Yes sir, I do very frequently wherever they are in litigation.

Q. What do you know about their lands on Horseshoe Bend, or Horseshoe Island?

A. What do you mean in regard,—well, the first time I have ever been on the land was last Monday, but I have been familiar with Horseshoe Island long before ever I was connected with the Free States Lumber Company or the Rust Land & Lumber Company.

Q. In what way?

A. I was in the United States Government employ for the states of Arkansas, Mississippi and Louisiana for eight years prior to 1904.

Q. How did you become familiar with this island and these matters in that office?

A. Well, some matters came up in Phillips County in 1901 where my attention was called to it, and I was asked to make an investigation at that time for the State Land Commissioner; there was some litigation at that time, I think between the Rust Land & Lumber Company and a man named McKee where the question of a state line came up at that time.

Q. At that time were you connected with the Rust Land & Lumber Co.?

128 A. No sir, I didn't know them at all, never knew of them, I was in the United States Government employ, and I made an investigation, and went to Helena and made an investigation from the records.

Q. What records did you investigate?

A. I investigated the records, got the '63 survey, and then I had the maps of '33 survey up in Mississippi shore.

Q. Was there a traverse of the Mississippi River on the Arkansas side?

A. In '16 there was a survey of '16, which was the only one that was on file in Washington.

Q. Where were you stationed then?

A. In Little Rock, Arkansas, my headquarters.

Q. Was there a record of any traverse of the Arkansas bank in '33?

A. Yes sir, there was a very distinct and clear — of the entire river.

Q. You mean in '16 or '33?

A. Made in '33 and '35.

Q. Where was that record found?

A. I had those plats from Washington, and I saw them in Mississippi in the land office at Jackson, which I had also charge of.

Q. Have you got them with you?

A. I have got certified copies of them right here.

Q. You have certified copies of plats showing the traverse of the Arkansas bank in '16, I mean in '33?

A. Yes sir, the same map that the other party offered in evidence.

Q. And have you traverse or not of the Mississippi shore, other than those that have been introduced of '33?

A. There never has been a survey made but that one, that was the first and only survey made by the United States Government of the lands in the State of Mississippi at that point.

Q. Now, you said, I believe, that you *you* have only seen this island about how long ago?

129 A. Last November, just a few weeks ago.

Q. And what inspection of the lands there did you make, if any?

A. Went with Mr. Calhoun and watched the surveying, paid particular — to the lines, the meandering, the contour of the beds of streams.

Q. Did you ever make a map of the island, or not, and the surroundings?

A. I did, sir.

Q. Where is that map?

A. Right here, sir.

Q. From what data did you make that map?

A. I made the map, first from the data furnished by the United States Government of the survey of '33, showing the exact meanderings as given in the field notes by United States Government, then I had a survey made by Mr. Griffith for the Rust Land & Lumber Company, which started at the corner of Section- 26, 27, 34 and 35, Town. — South, Range 4 E., where he measured across the river by triangulation; and the corner of Sections 2, 3, 10 and 11 which, at the time of the 1816 survey was made, was not in existence but was in the river at that time by a distance of two and a half chains; he established that corner, that gave a connection with a line which Major Fountain and Major Purvis, of Helena, run, I think in 1902 or 1903, and by the notes which I had from that survey, I located exactly this corner here, which was the original southeast corner of Section 3 in 1816, which was two chains west of the true corner established by Mr. Griffin, which, at that time, was in the river and now on high and dry land. Having that corner here, and knowing the exact bound-ry line of the Mississippi River, according to the survey of 1816, I had no trouble whatever to trace the bound-ries of the survey of '16 of the Section line on the map. The other section lines here, I put in from the maps furnished by the Government of the survey of '33 of the Mississippi shore, which super-
130 seeded any map made in '16, according to the rules of the department.

Q. I will ask you, if you say you made that map, to describe that map to the jury and everything on it?

A. These lines which show here the center channel of the river, the inlet here and the outlet here, I procured from surveys——

Q. Let me call your attention to one thing: don't say "here," but say something that will appear in the record, as to what part of the map you refer to?

A. A channel which starts on the so-called east side of the island near Friars Point, right at the Mississippi River, and runs south to where the so-called Old River bed covered by deep water is now, and the channel that runs from the northwestern part of that body of water, which runs up north to the Mississippi River, I procured those from data furnished me by the United States River Commission, according to their actual survey of '79, and also by this east line here by data furnished on the map made by Major Fontaine and Mr. Purvis. The line here as probable Arkansas shore in '33 was put there according to the map of Township 29 North, Range 4 West; Township 28 N., Range 4 West; 29 North, Range 5 West, and 28 North, Range 5 West, as shown on their Government maps being about from 50 to 60 chains wide, and running parallel with the meandering shore line, where the metes and bounds were given by the United States Government of the survey of '33. There is no island shown in that survey, it is an absolute straight river.

Q. You speak there now of a meandering line of the Mississippi shore at that time?

A. Probable Mississippi River shore of 1833. Beginning at what is now the center of '31, which, in '33 wasn't in existence; the United States Government surveyors surveyed that eastern bound-ry of the Mississippi River, the eastern bound-ry of what is called on the map erroneously Mud Lake, and that meandering of the so-called Mud Lake quits right here at a little bayou, may be five chains east, about range line between Township 28 S., Range 4 West, and 29
131 North, Range 4 West, and from that time on, there is an absolute clear straight river shore all of the way up to the Mississippi River around Horseshoe Island, and nothing is mentioned of any island whatever. The field notes don't mention the island, or I mean a lake here and a narrow strip of land, and it is only the map that shows a little strip of land in here.

Q. What are you referring to?

A. That is Mud Lake, between Mud Lake and the Mississippi River, but nothing of that kind is shown in Township 29, Range 5 West, in which the land in controversy is located; a clear straight survey line of the Mississippi shore of the Mississippi River is surveyed.

Q. Is the land in controversy in 28 or 29?

A. 29, 5 West, I beg your pardon.

Q. Isn't it 28?

A. No. 28, 5 West is right.

Q. Go ahead, with the explanation?

A. The red line, which begins right above Friars point and follows right southwardly, first southwest, and then south, almost due south, near the center of Section 31, and then around the east line of the so-called Mud Lake, near the range line between the two town-

ships, and then for some distance on dry land then for a distance of about two miles there, or near the northern shore of the Old River, then a very short distance right close to the eastern shore of Old River, and from there on through Old River, and then a little bit on the east side of the present outlet, and then considerably west of the present outlook of the river, and from there on up, showing considerable cutting off of land here, shows the old meandering line of the Mississippi shore of the Mississippi River in 1833.

Q. From what date?

A. United States survey filed notes, not the map, the field notes, *not the map, the field notes*. I never go by map as a general rule unless there is a discrepancy, the field notes always govern,
132 and the maps are made from the field notes by men who have nothing to do with the survey whatever.

Q. Now proceed?

A. This line here on the west line of Mud Lake is the line of the river as shown on the map of the United States Government of the survey of '33, but there are no field notes on that line whatever.

Q. You mean the line of the west side?

A. The west side of Mud Lake and the east side of the river traverse. I have been all along this river here and came up, all up here.

Q. What river you speak of?

A. That is the old river bed from the range line west and north along Sections 12, 11, 10 and 3, and then along the channel, narrow channel up close to center of '35 where we quit surveying. From that place, I walked along that channel clear to the Mississippi River.

Q. What, if any, evidence of a channel did you find extending from that point to the river itself?

A. With the exception of a very little sand bar here through which a narrow channel runs through, which is, the last high water filled up, evidently filled up to some extent, because some of it very low right above that sand bar there out to the Mississippi River is a well defined channel about a chain to two chains wide with banks fifteen to twenty feet on either side.

Q. How close to the river does that channel extend?

A. Clear up to the mouth of the river.

Q. What season were you there, in November of this year?

A. November of this year.

Q. Was it dry?

A. Very dry river, as low as it has been for years.

Q. River at its lower stage?

A. Yes, sir, practically lower than it has been for many years.

Q. Water in that channel or not?

A. Considerable water.

Q. Where was the water?

133 A. Found water along here, and from here, and here on out.

Q. Say where you mean by "here"?

A. We found that along 26 and through about one-half of Section 25 above the sand bar.

Q. How about the channel that you have marked on the other side, the east side of the map going north?

A. There are two channels, one channel is on the west side of the old meandering line of '33 of the Mississippi shore, and one channel is about in the center of the river of '33 running in a southwardly direction going into what was in 16 land on the island, taken part of that land off, in other words, making here on the Mississippi shore a mile of land. This, I located as I stated from surveys made by Major Fontaine and Mr. Purvis, and also from data of the United States Mississippi River Commission.

Q. What, if anything, did you do with reference to following the channel that you have defined there on the map from the northeast end of Old River to the Mississippi River itself?

A. Well, I have made observation from about this point over;— I haven't gone any further, but then from about here.

Q. Where is that?

A. That is right north of the range line about a quarter of a mile.

Q. Where, if at all, does the Mississippi levee appear on the map?

A. The Mississippi levee appears on the range line in a west and northwesterly direction right close up to the border of the old river, as close as it safely can be built, until it strikes the center line of about say fractional 11 running east; and then from there it bears a little southwest, and then west, and then considerably southwest.

Q. How far is the levee from the bank of Old River?

A. I judge anywhere from fifty to a hundred yards, an average of 75 yards perhaps.

Q. Did you make or not any measurement of Old River?

A. Yes, sir, we made, measurements of Old River by triangulation.

134 Q. Did you make any measurements, or not, of the fields that appear upon that map?

A. I did not.

Q. Where did you get the data?

A. I got the data from Mr. Calhoun?

Q. Was he or not present when you made the map?

A. Yes, sir, in fact I finished it here last Sunday afternoon.

Q. When was the map prepared?

A. It was finished Sunday.

Q. You mean last Sunday?

A. Yes, sir.

Q. Where?

A. Right here in this town?

Q. Mr. Calhoun and you do that?

A. Yes, sir.

Q. Were you with him or not when he made any measurements of the depths of Old River?

A. I wasn't there, but I made some of them myself, I went out in a boat with a fisherman, and stayed out for about an hour.

Q. What part did you measure?

A. From about the center line of the west half of Section 11, from there on.

Q. What was the depth there at that point?

A. Well, we had a pole eight feet long, and we couldn't reach the bottom.

Q. There was no bottom depth?

A. No bottom, there was no drainage, from there on, we went up here and we found no place until we come about Dustin—of a little narrow opening in what they call Dustin pond, we found a depth there about five feet, and about ten feet on up here.

Q. At these places where you found no bottom, how far were they from the south shore?

A. From the south shore about a hundred yards.

Q. And how wide was Old River at this place?

A. Three hundred yards nearly.

135 Q. Now, where else, if any, did you make any further measurements?

A. We went over in a boat until we got to this outlet here and got stalled.

Q. What outlet do you speak of?

A. Of a so-called Dustin Pond we got in a mud bank, and had a hard time to get out, I wanted to go on, but soon found out I would risk my life if I got in here, for I would sink in mud about my neck.

Q. That was between Dustin Pond and Old River?

A. Yes, sir, right up here where the so-called Dustin Pond has some connection with the river.

Q. What connection has it with Old River at that point?

A. It looked to me somebody had gone in there and made an unnatural outlet; in other words, made a ditch so that they could go in with boats to get fish out there, and I found that to be a fact on examination.

Q. What was there, if anything, in the nature of a growth of any kind of small timber, or other timber in this connection between Old River and Dustin Pond?

A. In this Dustin Pond.

Q. In the connection between Dustin Pond and Old River?

A. Right below the connection of Dustin Pond, have a lot of old dead tall willows, I expect some of them 30 or 40 feet tall and right in the bottom, extending northeast, that is marked on the plat here from the so-called outlet are willows some of them as high as perhaps fifteen feet, and it looked like a marsh more than anything else to me.

Q. Do you mean extending clear across this connection point?

A. I didn't want to risk my life, my life was too precious to go through there, and the boatman wouldn't take me through for love or money.

Q. How far is it from the water, from Dustin Pond to Old River?

A. The water to Old River, the narrowest point, about 650 feet.

Q. How wide was that connection between the two, between Dustin Pond and Old River?

136 A. Right there about 600 feet?

Q. About that wide?

A. Wide, yes, sir.

Q. I am speaking of the distance between Dustin Pond and Old River?

A. That's about 600 feet, the nearest place right at the upper bank here.

Q. Now, there was some kind of a connection, you say, was there a slash or slough, or lake?

A. Looked like a ditch cut out, sir.

Q. How wide was it?

A. About ten feet looked like.

Q. What other connection was there?

A. I didn't see any except mud.

Q. Did it go through any timber or not?

A. I couldn't see any timber in Dustin Pond.

Q. There was a ditch cut through timber?

A. No, through willows.

Q. And these are the willows you have described as tall willows?

A. Yes, sir.

(Fitzgerald:) With the permission of the attorneys for the defendant, I would like to put Mr. Mashburn on the stand, just for one or two questions in re-buttal of what has been said, he wants to get off on the train.

(Montgomery:) We have no objection; but we want it strictly in re-buttal.

L. W. MASHBURN, a witness heretofore introduced, recalled by the plaintiff, testified further as follows:

Q. Mr. Mashburn, calling your attention again to the map which you had here yesterday, and taking this map in connection with the map filed here by the defendants, drawn by Mr. Schlierholz, what is the exhibit here, Exhibit 4, you will notice on your map as well as on the map Exhibit 4, there is a blue space, or small body of water called Dustin Pond, do you know that piece of water called Dustin Pond, do you know that piece of water?

137 A. I think I do.

Q. Have you been there and seen it yourself?

A. Yes sir.

Q. I will ask you, if you know, what, if any, physical connection there is between Pecan Lake as shown on your map and Dustin Pond?

A. Why, there is a connection.

Q. At the southwest end thereof, northwest end?

A. There is a connection there that I ran a skiff around without any apparent trouble at all, if we run aground, I don't recall it.

Q. Did you go through there in a boat?

A. I did.

Q. Now, is there any connection with Dustin Pond and Pecan Lake at the southeast end?

A. There was, yes sir.

Q. Was the water in it?

A. There was.

Q. Did you walk around that?

A. I did; that wasn't survey, however, by me, but I saw it.

Q. And walked around it?

A. Yes sir.

Cross-examination:

Q. Didn't exactly understand when you said the southwest end, the connection between Dustin Pond and that lake?

A. At this point?

Q. Yes?

A. Why, you say that we run the skiff around there, and I don't recollect we having any trouble whatever.

Q. You come from Dustin Pond into the lake through that passage there?

A. Why, we went from Pecan Lake or Old River, as indicated here.

Q. Into Dustin Pond?

A. Yes sir.

Q. What is the width of the water that you passed through
138 in the connection between the two?

A. Well, the connection, as I saw it was over a hundred feet wide there was no connection no place that you could call a narrow connection at all just spread out all into one.

Q. When was that Mr. Mashburn?

A. It was, as I recall it, in January of last year, I won't be positive of that though in January of this year, I won't be positive.

Q. Was the river out of its banks?

A. No sir.

Q. Was the river up over the sandbars?

A. No sir.

Q. In the low places?

A. No sir.

Q. Well, it was the rainy season of the year wasn't it?

A. Well, it was in January, sometimes it is the rainy season, and sometimes not.

Q. That particular January it had been raining very hard?

A. I don't recall it was specially rainy January, but of course wetter than it is now.

Q. Had been heavy rains from before Christmas up to that time?

A. I don't recall about that.

Q. As a matter of fact, there is usually heavy rains?

A. As a matter of fact, it is a wetter season than the present time is.

Q. They are not having been but very little up to this time, been a very dry Fall?

A. Well, I say it is a wetter season than the present season.

Q. But that is what is called a part of the wet season of the year?

A. It is, I think.

Mr. SCHLIERHOLZ, recalled, testified further as follows:

Q. Mr. Schlierholz, you know the deraignment of title to the lands of the Rust Land & Lumber Company in this territory involved in this suit?

139 A. I do, I am the custodian of all of the papers.

Q. I want to ask you what, from whom did they acquire their title from?

A. From Wm. A. Rust.

Plaintiff objects to that.

Court overrules the objection.

Plaintiff excepts.

Q. When did they purchase it from Wm. A. Rust?

A. It was purchased in September, the 20th, '95.

Q. By whom?

A. By Rust Land & Timber Co. after it had been organized, from Wm. A. Rust, who became the President of the Rust Land & Lumber Co.

Q. Who was he?

A. Lived at that time in the City of Boston?

Q. What connection did he have at the organization, or at the present?

A. He was the President and one of the principal stockholders.

Q. You have a deed from anybody to Wm. A. Rust?

A. Yes sir, from Lydia A. Stringer.

Q. Have a deed from Wm. A. Rust to the Rust Land & Lumber Co.?

A. That is a general deed, conveying several thousand acres lying in various counties in Arkansas.

Q. What do you know, if anything, as to who has paid the taxes on that land since '95?

A. The Rust Land & Timber Company.

Q. How do you know that?

A. From the tax receipts.

A. You mean the Rust Land & Lumber Company?

A. The Rust Land & Lumber Company has paid them.

Q. Have you tax receipts for those years?

A. Yes sir, except one year, which has been mislaid.

Q. You mean they—

A. I haven't prior to that time, I have them from '85 I think, with the exception of one year, which was lost.

(Montgomery:) I would like to introduce these in evidence
140 if counsel will give us permission to withdraw them and leave a copy of them in their place.

(Fitzgerald:) You can introduce them.

(Montgomery:) We introduce the tax receipts for '94 for the

taxes of the year '95, for the taxes of '94, February 6th, marked 5, 6, 7, 8, 9, 10——

Q. Who was Dan Fitzhugh?

A. He was our manager at that time. (In connection with Exhibit 10.)

(Fitzgerald:) We object to that tax receipt, issued in the name of Dan Fitzhugh.

Court overrules the objection.

Plaintiff excepts.

(Montgomery:) Also tax receipts marked Exhibits 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

(Witness:) The total acreage for 1909——

Plaintiff objects to the attorney stating how much land is in the tax receipt from each tax receipt.

Q. Then, I will ask the witness to figure the acreage in that tax receipt for the year 1909?

A. 1,430.09.

Q. What is the total acreage in the tax receipt for the year 1908?

A. 1,450.09.

Q. What is the total acreage shown in the tax receipt for the year 1907?

A. 164.52.

Q. What is the total acreage shown in the tax receipt for the year 1906?

A. 1464.55.

Q. What is for the year 1905?

A. 1274.52.

141 Q. What is for the year 1904?

A. 1264.52.

Q. What for the year 1903?

A. 1265.52.

Q. What for the year 1902?

(Fitzgerald:) That is just taking up the time, tax receipts speak for themselves, and don't include the land in controversy.

(The Court:) I will only permit questions as to the lands in controversy.

The said tax receipts introduced, marked exhibits 5 to 22 inclusive, are in words and figures following.

142 R. C. Burke, Sheriff and Collector.
F. F. Kitchens, Deputy.

Tax Receipt—1894.

Tax books are open for collection of taxes from Jan. 1st to April 10th of each year.

STATE OF ARKANSAS,
County of Philips:

HELENA, ARK., Feb. 6/1895.

Received of Rust Land Company by Dan Fitzhugh, Thirty and 25/100 Dollars for taxes due on the following described Real Estate in Philips County, Arkansas for the year 1894.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. —.....	2	4 S.	4 E.	10.15	10
Frl. S.W. —.....	2	"	"	25.95	25
S. pt. Frl. N.W. —.....	2	"	"	45.53	45
All	3	"	"	431.78	950
Frl. S. 1/2.....	10	"	"	158.06	160
All Frl	14	"	"	148.29	150
All	15	"	"	375.90	375
All	22	"	"	56.53	55
All	23	"	"	12.33	15
					<hr/> 1785

State Tax.

	Dollars. Cents.
Common School Tax.....	3.57
Sinking Fund Tax.....	.89
Pension Fund Tax.....	.45
State Gen-ral Tax.....	4.02

County Tax.

County Interest.....	3.57
General County.....	8.92
District School Fund.....	8.93
District Levee Fund.....	....

City Tax.

City General.....
City Judgment.....	....
City Contingent.....	....

Total Taxes.....\$30.35

NOTICE.—The Holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

R. C. BURKE,
Sheriff and Collector,
 By F. F. KITCHENS, D. S.

Frl. N. W. Sec. 3 In name of J. T. Jefferson.
 Copy. Ex. 5. YEH.

143 R. C. Burke, Sheriff and Collector.
 F. F. Kitchens, Deputy.

Tax Receipt—1895.

NOTICE.—The Tax books are open for the collection for taxes from Jan. 1st to April 10th of each year. After April 10th, 25% Penalty and costs added.

STATE OF ARKANSAS,
County of Phillips:

HELENA, ARK., 4/30/1896.

Received of Rust Land. Co. (White), Fifty Three and 63/100 Dollars for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1895:

Description.	Sec.	Twsp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. $\frac{1}{4}$	2	4 S.	4 E.	10.15	10
Frl. S.W. $\frac{1}{4}$	2	"	"	25.95	25
S. pt. Frl. N.W. $\frac{1}{4}$	2	"	"	45.53	45
N.E. $\frac{1}{4}$	3	"	"	160.00	160
Frl. S.E. $\frac{1}{4}$	3	"	"	159.75	160
Frl. S.W. $\frac{1}{4}$	3	"	"	28.42	30
Frl. N.W. $\frac{1}{4}$	3	"	"	83.61	600
Frl. S. $\frac{1}{2}$	10	"	"	158.06	160
Frl. All	14	"	"	148.29	150
Frl. N.E. $\frac{1}{4}$	15	"	"	159.40	160
S.E. $\frac{1}{4}$	15	"	"	160.00	160
Frl. W. $\frac{1}{2}$	15	"	"	56.50	55
Frl. All	22	"	"	56.53	55
Frl. All	23	"	"	12.33	15
					<hr/> 1785

State Tax.

	Dollars.	Cents.
Common School Tax	3.	57
Pension Fund Tax .....		.45
State General Tax	4.	02

County Tax.

County Interest	3.57
County General	8.93
District School Fund.....	8.92
District Levee Fund.....	....

City Tax.

City General .....	....
City Judgment .....	....
City Contingent .....	....
	<hr/>
	29.46

25% Penalty	7.37
Cost	16.80
	<hr/>

Total Taxes 53.63

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers, and if any error exists, to return same at once for correction.

R. C. BURKE,

Sheriff & Col.,

By F. F. KITCHENS, *Deputy.*

Copy. Ex. 6. YEH.

144 R. C. Burke, Sheriff and Collector.
F. F. Kitchens, Deputy.

Tax Receipt—1896.

NOTICE.—The Tax Books are open for the collection of taxes from Jan. 1st to April 10th of each year. After April 10th, 25% penalty and costs added.

STATE OF ARKANSAS,
County of Phillips:

HELENA, ARK., April 3d, 1897.

Received of W. A. Rust, (White) Twenty nine and 46/100 Dollars for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1896.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. $\frac{1}{4}$	2	4 S.	4 E.	10.15	10
Frl. S.W. $\frac{1}{4}$	2	"	"	25.95	25
S. pt. Frl. N.W. $\frac{1}{4}$	2	"	"	45.53	45
N.E. $\frac{1}{4}$	3	"	"	160.00	160
Frl. S.E. $\frac{1}{4}$	3	"	"	159.75	160
Frl. S.W. $\frac{1}{4}$	3	"	"	28.42	30
Frl. N.W. $\frac{1}{4}$	3	"	"	83.61	600
Frl. S. $\frac{1}{2}$	10	"	"	158.06	160
Frl. All.....	14	"	"	148.29	150
Frl. All.....	15	"	"	375.90	375
Frl. All.....	22	"	"	56.53	55
Frl. All.....	23	"	"	12.33	15
					<hr/> 1785

State Tax.

	Dollars.	Cents.
Common School Tax.....	3.	57
Pension Fund Tax.....		.45
State General Tax.....	4.	02

County Tax.

County Interest.....	3.57
County General.....	8.93
District School Fund.....	8.92
District Levee Fund.....	....

City Tax.

City General.....	....
City Judgment.....	....
City Contingent.....	....
25 Per cent Penalty.....	....
Cost .....	....

Total Taxes.....\$29.46

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

R. C. BURKE,
Sheriff and Collector,
 By KITCHENS, *Deputy.*

Copy. Ex. 7, YEH.

145 R. C. Burke, Sheriff and Collector.
F. Kitchens, Deputy.

Tax Receipt—1897.

Tax Books are open for Collection of Taxes from January 1st to April 10th of each year.

STATE OF ARKANSAS,
County of Phillips:

HELENA, ARK., 3/4/1898.

Received from Rust Land & Lbr. Co. Twenty nine and 8/100 Dollars for Taxes due on the following described real estate in Phillips County, Arkansas, for the year 1897.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. $\frac{1}{4}$	2	4 S.	4 E.	10.15	10
Frl. S.W. $\frac{1}{4}$	2	"	"	25.95	25
S. pt. Frl. N.W. $\frac{1}{4}$	2	"	"	45.53	45
All Frl.....	3	"	"	431.78	950
S. $\frac{1}{2}$ Frl.....	10	"	"	158.06	160
All Frl.....	14	"	"	148.29	150
All Frl.....	15	"	"	375.90	370
All Frl.....	22	"	"	656.53	55
All Frl.....	23	"	"	12.33	15
					<hr/> 1780

State Tax.

	Dollars.	Cents.
Common School Tax.....	3.	56
School Interest Tax.....		44
Pension Fund Tax.....		45
State General Tax.....	4.	00

County Tax.

County Interest	3.56
County General	8.90
District School Fund.....	8.90
District Levee Fund.....	....

City Tax.

City General .....	....
City Judgment .....	....
City Contingent .....	....

Total Taxes..... \$29.81

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return same at once for correction.

R. C. BURKE,
Sheriff and Collector.
 By KITCHENS, *Deputy.*

Copy. Ex. 8. YEH.

146 R. C. Burke, Sheriff and Collector,
 F. F. Kitchens, Deputy.

Tax Receipt—1898.

Tax Books are open for Collection of Taxes from January 1st to April 10th of each year.

STATE OF ARKANSAS,
County of Phillips:

HELENA, ARK., 1-23-1899.

Received of Rust Land & Lumber Co. by Dan Fitzhugh (White)
 Twenty-nine and 83/100 Dollars For Taxes on the following de-
 scribed real estate in Phillips County, Arkansas, for the year 1898.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. ¼.....	2	4 S.	4 E.	10.15	10
Frl. S.W. ¼.....	2	"	"	25.95	25
S. pt. Frl. N.W. ¼.....	2	"	"	45.53	45
All Frl.	3	"	"	431.78	950
Frl. S. ½.....	10	"	"	158.03	160
Frl. All.....	14	"	"	148.29	150
Frl. All.....	15	"	"	375.90	370
Frl. All.....	22	"	"	53.00	55
Frl. All.....	23	"	"	12.33	15
					<hr/> 1780

State Tax.

	Dollars.	Cents.
Common School Tax.....	3.	56
School Interest Tax.....		.45
Pension Fund Tax.....		.45
State General Tax.....	4.	01

County Tax.

County Interest	3.56
County General	8.90
District School Fund.....	8.90
District Levee Fund.....	....

City Tax.

City General .....	....
City Judgment .....	....
City Contingent .....	....
Total Taxes.....	\$29.83

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return same at once for correction.

R. C. BURKE,
Sheriff and Collector.
 By KITCHENS, *Deputy.*

Copy. Ex. 9. YEH.

147 R. C. Burke, Sheriff and Collector.
 F. F. Kitchens, Deputy.

Tax Receipt for 1899.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

HELENA, ARK., 4 6-1900.

STATE OF ARKANSAS,
County of Phillips:

Received of Dan'l Fitzhugh (White), Fifty-three and 98/100 Dollars for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1899.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. $\frac{1}{4}$	2	4 S.	4 E.	10.15	20
Frl. S.W. $\frac{1}{4}$	2	"	"	25.95	50
S. pt. Frl. N.W. $\frac{1}{4}$	2	"	"	45.53	100
All Frl.....	3	"	"	431.78	1290
Frl. S. $\frac{1}{2}$	10	"	"	158.06	320
Frl. All.....	14	"	"	148.29	300
Frl. All.....	15	"	"	375.90	750
Frl. All.....	22	"	"	53.00	110
Frl. All.....	23	"	"	12.33	25
					2965

State Tax.

	Dollars.	Cents.
Common School Tax.....	5.	93
School Interest Tax.....	2.	97
Pension Fund Tax.....	.	74
State General Tax.....	8.	67

County Tax.

County Interest.....	5.93
County General.....	14.83
District School Fund.....	14.82

City Tax.

City General.....	.....
City Judgment.....	.....
Contingent Fund .....	.....

Total Taxes.....\$53.89

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

R. C. BURKE,
Sheriff and Collector.

By ———, *Deputy.*

Copy. Ex. 10. YEH.

148 F. F. Kitchens, Sheriff and Collector.
W. B. Dalzell, Deputy.

Tax Receipt for 1900.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

HELENA, ARK., 4-8-1901.

STATE OF ARKANSAS,
County of Phillips:

Received of Rust Land & Lumber Co. (White) Fifty-one and 92/100 Dollars for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1900.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. ¼.....	2	4 S.	4 E.	10.15	20
Frl. S.W. ¼.....	2	"	"	25.95	50
S. pt. Frl. N.W. ¼.....	2	"	"	45.53	100
All Frl.....	3	"	"	431.78	1290
Frl. S. ½.....	10	"	"	158.06	320
Frl. All.....	14	"	"	148.29	300
Frl. All.....	15	"	"	375.90	750
Frl. All.....	22	"	"	56.53	110
Frl. All.....	23	"	"	12.33	25
					<hr/>
					2965

State Tax.

	Dollars.	Cents.
Common School Tax.....	5.	93
School Interest Tax.....	2.	97
Pension Fund Tax.....	.	75
State General Tax.....	6.	68

County Tax.

County Interest.....	5.	93
County General.....	14.	83
District School Fund.....	14.	83
District Levee Fund.....		

City Tax.

City General.....		
City Judgment.....		
City Contingent.....		

Total Taxes.....\$51.92

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

F. F. KITCHENS,
Sheriff & Collector,
 ———, *Deputy.*

Copy. Ex. 11. YEH.

149 F. F. Kitchens, Sheriff & Collector.
 W. B. Dalzell, Deputy.

Tax Receipt for 1902.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

HELENA, ARK., 4-10-1903.

STATE OF ARKANSAS,
County of Phillips:

Received of Rust Land & Lumber Co. (White) Fifty-two and 64/100 Dollars for taxes on the following described real estate in Phillips County, Arkansas, for the year 1902.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. ¼.....	2	4 S.	4 E.	10.15	20
Frl. S.W. ¼.....	2	"	"	25.95	50
S. pt. Frl. N.W. ¼.....	2	"	"	45.53	100
All	3	"	"	431.78	1290
Frl. S. ½.....	10	"	"	158.06	320
Frl. All.....	14	"	"	148.29	300
Frl. All.....	15	"	"	375.90	750
Frl. All.....	22	"	"	56.53	110
Frl. All.....	23	"	"	12.33	25
					<hr/> 2965

State Tax.

	Dollars	Cents.
Common School Tax 2.....	5.	93
Fund 1-2.....	1.	48
Sinking Fund 1-4.....		74
Pension 3-4.....	2.	23
State General Tax 2-1-4.....	6.	67

County Tax.

County Interest 2.....	5.93
County General 5.....	14.83
District School Fund.....	14.83
District Levee Fund.....	....
Rode Tax 3.....	....

City Tax.

City General 5.....	....
City Judgment 5.....	....
City Contingent 2.....	....

Total

25%
Cost

Total taxes.....\$52.64

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

F. F. KITCHENS,
Sheriff & Collector,
— — —, Deputy.

Copy. Ex. 12. YEH.

150 F. F. Kitchens, Sheriff & Collector.
W. B. Dalzell, Deputy.

Tax Receipt for 1903.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

HELENA, ARK., April 1st, 1904.

STATE OF ARKANSAS,
County of Phillips:

Received of Dan Fitzhugh (White) Ninety four and 87/100 Dollars for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1903.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. 1/4.....	2	4 S.	4 E.	10.15	25
Frl. S.W. 1/4.....	2	"	"	25.95	105
S. pt. Frl. N.W. 1/4.....	2	"	"	45.53	220
All Frl.....	3	"	"	432.78	1995
Frl. S. 1/2.....	10	"	"	158.06	630
Frl. All.....	14	"	"	148.29	590
Frl. All.....	15	"	"	375.90	1505
Frl. All.....	22	"	"	56.53	225
Frl. All.....	23	"	"	12.33	50
					<hr/> 5345

State Tax.

	Dollars.	Cents.
Common School Tax 2.....	10.	69
Capital Fund 1-2.....	2.	67
Sinking Fund 1-4.....	1.	34
Pension 3-4.....	4.	01
State General Tax 2-1-4.....	12.	02

County Tax.

County Interest 2.....	10.	69
County General 5.....	26.	73
District School Fund.....	26.	72
District Levee Fund 5.....		

City Tax.

City General 5.....		
City Judgment 5.....		
City Contingent 2.....		

Total

25 Per Cent.....
 Cost

Total Taxes.....\$94.87

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

F. F. KITCHENS,
Sheriff & Collector,
 — — —, *Deputy.*

Copy. Ex. 13. YEH.

151 F. F. Kitchens, Sheriff & Collector.
 W. B. Dalzell, Deputy.

Tax Receipt for 1904.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

HELENA, ARK., 4-6-1905.

STATE OF ARKANSAS,
County of Phillips:

Received of Dan Fitzhugh (White) One Hundred and Ten & 91/100 Dollars for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1904.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. ¼.....	2	4 S.	4 E.	10.15	25
Frl. S.W. ¼.....	2	"	"	25.95	105
S. pt. Frl. N.W. ¼.....	2	"	"	45.53	220
All Frl.....	3	"	"	431.78	1995
Frl. S. ½.....	10	"	"	158.06	630
Frl. All.....	14	"	"	148.29	590
Frl. All.....	15	"	"	375.90	1505
Frl. All.....	22	"	"	56.53	225
Frl. All.....	23	"	"	12.33	50
					<hr/> 5345

State Tax.

	Dollars.	Cents.
Common School Tax 2.....	10.69	
Fund 1-2.....	2.67	
Sinking Fund 1-4.....	1.34	
Pension 3-4.....	4.01	
State General Tax 2-1-4.....	12.02	

County Tax.

County Interest 2.....	10.69
County General 5.....	26.73
District School Fund.....	26.72
District Levee Fund 5.....	.....
Road Tax 3.....	16.04

City Tax.

City General 5.....	.....
City Judgment 5.....	.....
City Contingent 2.....	.....

Total

25 Per Cent.....	.....
Cost .....	.....

Total Taxes.....\$110.91

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

F. F. KITCHENS,
Sheriff & Collector,
SANDERS, *Deputy.*

Copy. Ex. 14. YEH.

152 F. F. Kitchens, Sheriff & Collector.
Amos Jarman, Deputy.

Tax Receipt for 1905.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

STATE OF ARKANSAS,
County of Phillips:

HELENA, ARK., 3-27-1906.

Received of Dan'l Fitzhugh (White), One Hundred and Nine & 61/100 Dollars, for Taxes due on the following described real estate in Phillips County, Arkansas, for the year 1905.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. ¼.....	2	4 S.	4 E.	10.15	25
Frl. S.W. ¼.....	2	"	"	25.95	105
S. pt. Frl. N.W. ¼.....	2	"	"	45.53	220
All Frl.	3	"	"	431.78	1995
Frl. S. ½.....	10	"	"	158.06	630
Frl. All	14	"	"	148.29	590
All Frl.	15	"	"	385.90	1505
All Frl	22	"	"	56.53	225
All Frl.	23	"	"	12.33	50
					<hr/> 5345

State Tax.

	Dollars. Cents.
Common School Tax.....	10.69
Pension 1	5.35
Capital 1-2	2.68
Sinking Fund 1-4.....	1.34
State General Tax 1-3-4.....	9.37

County Tax.

County Interest 2.....	10.69
County General 5.....	26.72
District School Fund.....	26.73
Levee Fund 5.....	16.04
Road Tax 3.....

City Tax.

City General 5.....
City Judgment 5.....
City Contingent 2.....

Total	\$109.61
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25 Per Cent Cost.....
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Total Taxes.....
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NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

F. F. KITCHENS,
Sheriff & Collector.
 AMOS JARMAN,
Deputy.

Copy. Ex. 15. YEH.

153 F. F. Kitchens, Sheriff & Collector.
Amos Jarman, Deputy.

Tax Receipt for 1906.

Tax Books are open for collection of taxes from January 1st to April 10th, of each year.

STATE OF ARKANSAS,
County of Phillips:

HELENA, ARK., 4-10-1907.

Received of W. A. Rust (White), One Hundred and Nine & 61/100 Dollars, for Taxes due on the following described real estate in Phillips County, Arkansas, for the year 1907.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. $\frac{1}{4}$	2	4 S.	4 E.	10.15	25
Frl. S.W. $\frac{1}{4}$	2	"	"	25.95	105
S. pt. Frl. N.W. $\frac{1}{4}$	2	"	"	45.53	220
All Frl.	3	"	"	431.78	1995
Frl. S. $\frac{1}{2}$	10	"	"	158.06	630
All Frl.	14	"	"	148.29	590
All Frl.	15	"	"	375.90	1505
All Frl.	22	"	"	56.53	225
All Frl.	23	"	"	12.33	50
					<hr/> 5345

State Tax.

	Dollars. Cents.
Common School Tax 2.....	10.69
Pension 1	5.35
Capital 1-2	2.68
Sinking 1-4	1.34
State General Tax 1-3-4.....	9.73

County Tax.

County Interest 2.....	10.69
County General 5.....	36.72
District School Fund.....	26.73
Levee Fund 5.....	.....
Road Tax 3.....	16.04

City Tax.

City General 5.....
City Judgment 5.....
City Contingent 2.....

Total	<hr/>
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25 per cent.....
Cost
Total Taxes.....	\$109.61

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

F. F. KITCHENS,
Sheriff & Collector.
 JARMAN, *Deputy.*

Copy. Ex. 16. YEH.

154 F. F. Kitchens, Sheriff and Collector.
 I. M. Cartwright, Deputy.

Tax Receipt for 1907.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

STATE OF ARKANSAS,
County of Phillips:

HELENA, ARK., 6-6-1908.

Received of Rust Land & Lbr. Co. (White), One Hundred and Sixty-two and 14/100 Dollars, for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1907.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. ¼.....	2	4 S.	4 E.	10.15	25
Frl. S.W. ¼.....	2	"	"	25.95	105
S. pt. Frl. N.W. ¼.....	2	"	"	45.53	220
N.E. ¼.....	3	"	"	160.00	640
Frl. S.E. ¼.....	3	"	"	159.75	640
Frl. S.W. ¼.....	3	"	"	28.42	115
Frl. N.W. ¼.....	3	"	"	83.61	600
Frl. S. ½.....	10	"	"	158.06	630
All Frl.	14	"	"	148.29	590
Frl. N.E. ¼.....	15	"	"	159.40	640
S.E. ¼.....	15	"	"	160.00	640
Frl. W. ½.....	15	"	"	56.50	225
All Frl.	22	"	"	56.53	225
All Frl.	23	"	"	12.33	50
					5345

State Tax.		Dollars. Cents.
Common School Tax 3.....		16.04
Pension 1-2		8.02
Capital 1-2		2.67
State General Tax 1-3-4.....		9.36

County Tax.		
County Interest 2.....		10.69
County General 5.....		26.73
District School Fund.....		26.72
Cotton Belt Levee 5.....		.....
Laconia Levee 10.....		.....
Road Tax 3.....		16.04
Town of Marvell 5.....		.....

City Tax.		
City General 5.....		.....
City Judgment 5.....		.....
City Contingent 2.....		.....
Total		\$116.27
25 Per Cent.....		29.07
Cost		16.80
Total Taxes.....		\$162.14

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at once for correction.

F. F. KITCHENS,
Sheriff & Collector.
 C. P. SANDERS, *Deputy.*

Copy. Ex. 17. YEH.

155 F. F. Kitchens, Sheriff and Collector.

Tax Receipt for 1908.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

STATE OF ARKANSAS,
County of Phillips:

HELENA, ARKANSAS, April 2d, 1909.

Received of Rust Land & Lumber Co. (White), One Hundred Twenty-one and 63/100 Dollars, for Taxes due on the following described real estate in Phillips County, Arkansas, for the year 1908.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. $\frac{1}{4}$	2	4 S.	4 E.	10.15	25
Frl. S.W. $\frac{1}{4}$	2	"	"	25.95	105
S. pt. Frl. N.W. $\frac{1}{4}$	2	"	"	45.53	220
All Frl.	3	"	"	143.78	1995
All Frl.	10	"	"	323.63	830
All Frl.	14	"	"	148.29	590
All Frl.	15	"	"	375.90	1505
All Frl.	22	"	"	56.53	225
All Frl.	23	"	"	12.33	50
					<hr/> 5545

State Tax.

	Dollars. Cents.
Common School Tax 3.....	16.64
Pension 1-1-2	8.32
Capital 1-2	2.78
State General Tax 1-3-4.....	10.70

County Tax.

County Interest 2.....	11.09
County General 5.....	27.73
District School Fund.....	27.73
Cotton Belt Levee 5.....	.....
Laconia Levee 5.....	.....
Road Tax 3.....	16.64

City Tax.

City General 5.....	.....
City Judgment 5.....	.....
City Contingent 2.....	.....

Total	\$121.63
25 Per Cent.....	.....
Cost .....	.....

NOTICE.—The holder of this receipt is hereby notified to compare with his title papers without delay, and if any error exists, to return the same for correction.

F. F. KITCHENS,
Sheriff & Collector.
 ———, Deputy.

Copy. Ex. 18. YEH.

156 F. F. Kitchens, Sheriff & Collector.

Tax Receipt for 1909.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

HELENA, ARKANSAS, 3-25-1910.

STATE OF ARKANSAS,
County of Phillips:

Received of Rust Land & Lumber Co. (White) One Hundred and Twelve and 90/100 Dollars. For Taxes due on the following described real estate in Phillips County, Arkansas, for the year 1909.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
Frl. N.E. $\frac{1}{4}$	2	4 S.	4 E.	10.15	35
Frl. S.W. $\frac{1}{4}$	2	"	"	25.95	125
S. pt. Frl. N.W. $\frac{1}{4}$	2	"	"	45.53	225
Frl. All	3	"	"	431.78	1995
Frl. All	10	"	"	323.63	880
Frl. All	14	"	"	148.29	600
Frl. N.E. $\frac{1}{4}$	15	"	"	159.40	640
S.E. $\frac{1}{4}$	15	"	"	160.00	640
Frl. W. $\frac{1}{2}$	15	"	"	56.50	300
Frl. All	22	"	"	56.53	225
Frl. All	23	"	"	12.33	50
					<hr/> 5715

State Tax.

Dollars. Cents.

Common School Tax 3	17.15
Pension $1\frac{1}{2}$	8.58
Capital $\frac{1}{2}$	2.86
State General Tax $1\frac{3}{4}$	10.00

County Tax.

County General 5	28.58
District School Fund 5 and 7	28.58
Cotton Belt Levee 5 .....	.....
Laconia Levee 10 .....	.....
Road Tax 3	17.15
Town of Marville 3 .....	.....

City Tax.

City General 5.....	.....
City Judgment 5.....	.....
25 Per Cent. ....	.....
Cost .....	.....
Total	\$112.90

NOTICE.—The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return the same at office for correction.

F. F. KITCHENS,
Sheriff and Collector,
 C. P. SANDERS, *Deputy.*

Copy. Ex. 19. YEH.

157 Amos Jarmon, Sheriff and Collector.

Tax Receipt for 1910.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

HELENA, ARKANSAS, March 13, 1911.

STATE OF ARKANSAS,
County of Phillips:

Received of Rust Land & Lumber Co. (White) One Hundred Twelve and 18/100 Dollars for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1910.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
S. pt. Frl. N.W. ¼.....	2	4 S.	4 E.	45.53	225
Frl. S.W. ¼.....	2	"	"	25.95	125
N.E. ¼.....	3	"	"	160.00	640
Frl. S.E. ¼.....	3	"	"	159.75	640
Frl. N.W. ¼.....	3	"	"	83.61	600
Frl. S.W. ¼.....	3	"	"	28.42	115
Frl. N. ½.....	10	"	"	165.57	250
Frl. S. ½.....	10	"	"	158.08	630
All Frl.	14	"	"	148.29	600
Frl. N.E. ¼.....	15	"	"	159.41	640
S.E. ¼.....	15	"	"	160.00	640
Frl. W. ½.....	15	"	"	56.50	300
Frl. All.....	22	"	"	56.53	225
All Frl.	23	"	"	12.33	50

5680

State Tax.

	Dollars. Cents.
Common School Tax 3.....	17.04
Pension 1½	8.52
Capital 1½	2.84
State General Tax 1¼	9.94

County Tax.

County General 5	28.40
District School Fund	28.40
Cotton Belt Levee 5.....	
Laconia Levee 20	
Road Tax 3	17.04

City Tax.

City General 5.....	
City Judgment 3.....	
25 Per Cent.	
Cost	
Total	\$112.18

NOTICE.—Please return this receipt with remittance. The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return same at once for correction.

AMOS JARMON,
Sheriff & Collector,
 E. P. MALSTER, *Deputy.*

Copy. Ex. 20. YEH.

158 Amos Jarmon, Sgeriff and Collector.

Tax Receipt for 1911.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

HELENA, ARKANSAS, Jan'y 23, 1912.

STATE OF ARKANSAS,
County of Phillips:

Received of Rust Land & Lumber Co. (White) One Hundred Seven and 21/100 Dollars for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1911.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
S. Pt. Frl. N.W. $\frac{1}{4}$	2	4 S.	4 E.	45.53	225
Frl. S.W. $\frac{1}{4}$	2	"	"	25.95	125
Frl. All	3	"	"	431.78	1995
Frl. All	10	"	"	323.63	880
All Frl.	14	"	"	148.29	600
All Frl.	15	"	"	375.90	1580
All Frl.	22	"	"	56.33	225
All Frl.	23	"	"	12.07	50
					<hr/> 5680

State Tax.

	Dollars.	Cents.
Common School Tax 3.....	17.	04
Pension $1\frac{1}{2}$	8.	52
Capital $\frac{1}{2}$	2.	84
State General Tax $1\frac{3}{4}$	9.	94
State Sinking Fund $\frac{1}{8}$		71

County Tax.

County General 4.....	22.72
District School Fund	28.40
Cotton Belt Levee 5.....	....
Laconia Levee 20 .....	....
Road Tax 3	17.04

City Tax.

City General 5.....	....
City Judgment 3.....	....
25 Per Cent. ....	....
Cost .....	....

Total Taxes\$107.21

NOTICE.—Please return this receipt with remittance. The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return same at once for correction.

AMOS JARMON,
Sheriff and Collector,
 J. R. DALZELL, *Deputy.*

Copy. Ex. 21. YEH,

159 Amos Jarmon, Sheriff and Collector.
J. R. Dalzell, Deputy.

Tax Receipt for 1912.

Tax Books are open for collection of taxes from January 1st to April 10th of each year.

HELENA, ARKANSAS, 3-27-1913.

STATE OF ARKANSAS,

County of Phillips:

Received of Rust Land & Lumber Co. (White) One Hundred and Twelve & 89/100 Dollars for taxes due on the following described real estate in Phillips County, Arkansas, for the year 1912.

Description.	Sec.	Twp.	Range.	No. of acres.	Valuation as equalized.
S. Pt. Frl. N.W. ¼.....	2	4 S.	4 E.	45.53	225
Frl. S.W. ¼	2	4	4	25.95	125
All Frl.	3	4	4	431.78	1995
All Frl.	10	4	4	323.63	880
All Frl.	14	4	4	148.29	600
All Frl.	15	4	4	375.90	1580
All Frl.	22	4	4	56.33	225
All Frl.	23	4	4	12.07	50
					<hr/> 5680

State Tax.

	Dollars.	Cents.
Common School Tax 3.....	17.	04
Pension 1½	8.	52
Capital	2.	84
General State Tax 1¾	9.	94
State Sink. Fund ⅛.....		77

County Tax.

County General 5	28.40
District School Fund	28.40
Cotton Belt Levee 5.....	....
Laconia Levee 20 .....	....
Road Tax 3	17.04
Marvell 3 .....	....

City Tax.

City General 5.....
25 Per Cent. ....	....
Cost .....	....

Total\$112.89

NOTICE.—Please return this receipt with remittance. The holder of this receipt is hereby notified to compare same with his title papers without delay, and if any error exists, to return same at once for correction.

AMOS JARMON,
Sheriff and Collector,
M., *Deputy.*

Copy. Ex. 22. YEH.

160 Q. What acts of possession to your knowledge, your personal knowledge, has the Rust Land & Lumber Co. exercised over the land where this timber was cut and the other lands north of Old River since you have known, of being connected with the company?

A. I can only tell for the last four years, during that time, they have exercised full control over the entire island up to the north bank of the Old River, I have never heard, nor have we been notified of any claim on it of any land.

Q. What time you say, you have been connected with this company?

A. I have been connected ten years on the 7th day of February of next year.

Q. And during that time what, if any, claim of adverse ownership have you been advised of?

A. Never.

Plaintiff objects to that.

Court overrules objection.

Plaintiff excepts.

(Fitzgerald:) We object to the other question, the question was what acts of ownership had this company exercised, he answered by saying they claimed it, but he said in his testimony that he had never been on this land until the 8th of November, so how could he know.

(Witness:) I answered that there never had been any claim made to my knowledge.

Q. When was the first knowledge that you, or notice that you had of any adverse claim by any body to that land or timber north of Old River?

A. Last January when the last trespass was committed and we were notified.

Q. What adverse claim do you know of by King and Anderson, or these other persons who claimed to own lands on the main shore bank, ever made you any demand?

A. This was the very first time we ever heard of any person claiming any land north of Old River and east of Old River.

161 Q. You were not down there when the writ was levied were you?

A. No sir, I was in Memphis a short time after that.

Q. And you were not there when this timber was being rafted into Old River?

A. No sir, that was in the hands of Mr. De Shau.

Q. That wasn't in your department?

A. No sir.

Q. What inspection did you make of the timber at any time on these accretions?

A. Not very much of an inspection, I didn't go any more than about six chains inside of where they were going east and west, and ten chains, nine chains north and south.

Q. What examination did you make of the timber northeast of that, up to the main body of the—

A. For about thirty chains, I went up north and northwest, and I found some good size trees there, cottonwood.

Q. How was that timber going northeast from this place where the timber was cut, whether it continued to increase in size, or diminish in size?

A. No, it increased somewhat, very slightly, might have been a few inches apparently.

Q. And as you go northeast from the Old River?

A. It was northwest I went.

Q. I am speaking going northwest from the Old River?

A. Yes sir, it increased.

Q. Up towards the main river, you say it increased in size?

A. It increased in size somewhat.

Q. Were the trees larger or smaller up there about the pecan orchard, or the plum orchard as it is called?

A. I didn't go over there.

Q. How was the timber up at the eastern end of Dustin Pond?

A. East of Dustin Pond, old dead willows very tall for a very short distance right below that was very old timber, I should judge, near as I can tell from my knowledge of cottonwood, it must have been about sixty years old.

162 & 163 Q. Is there, or not, a way to tell the age of a tree by the rings in the tree?

A. Yes sir, if you cut it down you can tell it.

Q. Did you make any such examination as that?

A. No, but I knew from the size cottonwood timber, and having had a good deal personally with cottonwood timber in the Mississippi River bottoms, in Illinois for many years, I judge that timber must have been from fifty-five to sixty years old.

Q. You spoke of examining a map of the Government survey of 1815 and 1816, and traverse of the Arkansas bank of the river at that time, have you a certified copy of that map with you?

A. Yes sir, it is lying right on that map there.

Q. Is that it or not?

A. Yes sir, this is the one.

(Montgomery:) We will offer this in evidence as an exhibit to this witnesses testimony.

The same is by the stenographer marked exhibit 23, which said exhibit is in words and figures following, to wit:

164-167 Q. Where did you obtain that?

A. From the general land office in Washington, D. C. custodian of all of the Government surveys.

Q. You have also a certified copy of the map of the Government survey of the Mississippi shore of '33, like the one that has been introduced?

A. Exactly the same copy, also certificate, they are all made from the same plate.

Q. Have you a certified copy or not of the Government survey in the State of Mississippi of '33 in Township 28, Range 4?

A. Yes sir, the survey was finished in '35.

Q. What is this paper that I hand you?

A. That is 29, 4, West.

Q. Certified copy of the Government survey of '33?

A. Yes sir.

Q. '32?

A. Yes sir.

(Montgomery:) I will introduce that. Also two others. The said exhibit was by the stenographer marked exhibit 24, 25 and 26, the same being in words and figures following, to-wit:

168 Q. Have you ever seen the plat of the survey of the Mississippi River made under the directions of the Mississippi River Commission, chart number 28 and promulgated by the Commission?

A. Yes sir repeatedly.

Q. In '79, what is the paper that I had you, Mr. Schliehholz?

A. Charts number- 28 and 29 of the Mississippi River Commission, the Survey of 1879 and 1880.

Q. How, do you know that paper is that chart?

A. I have procured it from the Secretary of the Mississippi River Commission in St. Louis, Missouri.

Q. Is that or not a chart promulgated and published by the Mississippi River Commission?

A. It is, by the United States Government, the official map.

(Fitzgerald:) We object to that for the following reasons:

1. Because it appears that someone has pasted together different charts.

Q. You pasted them together yourself?

A. I pasted those together, and there is nothing taken off.

1. Because it appears that one of the attorneys for the Rust Land & Lumber Company has prepared and pasted together two charts proposing to be, or purporting to be charts of the Mississippi River Commission in '79 and '80.

2. Because the same are not certified to and are not purported to be correct maps, and

3. Because the survey is of the condition of the Mississippi River in '79 and '80, when this suit, is not the condition of the Mississippi

River in '79 and '80, but the Mississippi River in '48 when Horse-shoe cut-off occurred.

(Montgomery:) We offer that as a public document, promulgated by the Mississippi River Commission.

(The Court:) I sustain the objection.

Defendant excepts.

169 & 170 The said exhibit last mentioned was by the stenographer marked No. 27, and is in words and figures following:

171 Q. Mr. Schlierholz in your examination of that land around where the timber was cut, what examination, if any, did you make of the slough that appears to be, to run into Dustin Pond on the south side?

A. I didn't go that far over, so I couldn't tell, I didn't see any indication of any slough where I was.

Q. You are not prepared to testify as to the slough?

A. No sir.

Q. What distance did you go over east in Old River?

A. East of Old River?

Q. Go east in Old River?

A. About 650 feet.

Q. You are not prepared to testify whether there is a slough of water there or not?

A. No.

Q. You have them in your map that you drew there, you have designated that body Old River, why did you do that, and what data did you have to base that information upon?

A. This here, the circular shape. From my knowledge of the Mississippi River and the data which I had obtained from the Government surveys from the meandering of the line in '33 and '35, and other dates as well as from the course, which this narrow channel here and this wide channel below, and the narrow channel up here as taken, and following the course of the river of '33 and '35, and the fact that being '33 and '35, one side and '48 when this begun to fill up, the water receded from the Mississippi shore, filled up here in what is now Section 6, which wasn't in existence at the time of '35, except a very narrow piece and became here over three-quarters of a mile wide and accreted land on this side, east side, it naturally throwed the channel of the water down toward the Mississippi shore, and it took off a slight piece here and a slight piece up here, also a piece away up here in Section 35, and made some land for Mississippi in Section 26 about a quarter of a mile wide. Then right here on the range line, from this corner

172 here of Section 12, the southeast corner of Section 12 in '33, the distance was sixteen and a half chains to the line of the river in '35. Now, on account of this filling up here and throwing the river over that way, it made land here, so that instead of sixty and one half chains it is now a half a mile up to the Old River bed. Then the entire formation of this bank here shows that it must

have been the bank of the river and the caving bank along Section 11, in Section 10, in Section 3, and the very length of it shows that that must have been the Old River bed and couldn't have been a lake.

Q. What other reasons——

Plaintiff objects, and moves to exclude the answer of the witness to that question, because it is purely from theory.

(The Court:) I think some of it is incompetent. I overrule the objection.

Plaintiff excepts.

Q. What other reasons, if any, reasons have you than those that you have given?

A. The very fact that you have here a high bank, that this land is here where I have been on that part shows an actual filling up, while this below here has no indication of any filling whatever, and the fact that some trees over here got fifty-five to sixty years old.

Q. What information did you obtain from a general rumor in the neighborhood as to the name of that body of water, if any?

(Fitzgerald:) I object to the leading question.

(The Court:) I overrule the objection.

Plaintiff excepts.

A. On that morning when we commenced our survey——

Q. I mean generally, not any particular person right now?

A. Generally, the Old River.

Q. By the people generally?

A. Yes sir.

173 Q. What else did you hear it called, if anything?

A. We were looking for the southwest corner of Section 11, which is an old established corner, an old darkey came to us about a quarter of a mile east——

Q. Who was he?

A. He said his name was Charles McGhee, that old man testified here, we asked him where the corner was and he said, come on and I will show it to you, and he came over and showed us that corner. While we were getting ready to do the surveying Mr. De Chau in my presence and in the presence of Mr. Calhoun, asked old man McGhee if he ever heard of Pecan Lake, no, what is that called in here, he said well that's called Mud Lake.

(Fitzgerald:) We object to that what some man may have stated to him.

(The Court:) I sustain the objection.

Defendant excepts.

Q. Now Mr. Schlierholz if there is anything else that you know that is material to either of the parties to this suit that I haven't specially interrogated you about, I will ask you to state?

A. There is one point, that I would like to call the attention of

the Court and jury to and that is this: On a line between Section 3 and 10 and 28, 5, the attorney for the plaintiff tried to make it appear that Old River had cut into the slough and had gone up in a northwestern direction. There is *no* absolutely no such a thing, it is a chain and a half of my land between the well defined banks of this Old River and that slough, and unless the river here rises about, ten to fifteen feet, it wouldn't have any connection there at all.

(Fitzgerald:) We object to that statement because the attorney for the plaintiff absolutely repudiate any such idea or action for counsel or witness whenever he says this; I never made any such statement I never thought of it.

(Witness:) It wasn't you, it was your partner asked that question.

174 Q. That all Mr. Schlierholz?

A. That's all that I remember.

Cross-examination:

Q. How wide is the river here?

A. The river here just now, as near as I could tell is over three-quarters of a mile wide on account of the sand bar bank in here and coming over in here.

Q. What do you mean by near as you can tell, didn't you triangulate it?

A. Not across here, it was triangulated across here.

Q. How do you know it was?

A. Because I know if from a survey it was triangulated.

Q. Who told you that?

A. I have the notes.

Q. Who was that?

A. Mr. Griffith.

Q. Who was Mr. Griffith?

A. A surveyor.

Q. When did he triangulate it?

A. In '12, it was at that time sixty four chains wide.

Q. He told you that he triangulated that river?

A. I have the field notes.

Q. Oh, that what you drew the map from?

A. From the field notes that he surveyed of it, it was a careful triangulation.

Q. How do you know?

A. Because I have the figures.

Q. How do you know it was a triangulation?

A. Because I know it.

Q. How, were you there?

A. From my knowledge of the gentleman, and from the fact that the Government engineer was with him.

Q. You understand, Mr. Schlierholz, I don't wish to antagonize you at all, all I am asking you for is to get out the facts, I want to know whether you—

175 A. I testified and my knowledge from him, from his field notes.

Q. You mean he is a nice gentleman and good surveyor, and believe he did it right?

A. I know he is a gentleman and surveyor, and knows his business.

Q. And that's the way you judge that that river is that wide?

A. Yes sir that river was sixty chains wide, a little over sixty chains wide at the time of his survey right across here.

Q. Did you also know Mr. Purvis?

A. I know his reputation.

Q. He give you that too didn't he?

A. I haven't seen Mr. Purvis for years.

Q. Didn't you tell me you all drew——

A. I have his field notes.

Q. You all drew from his field notes?

A. Yes sir.

Q. Is also made from his field notes?

A. From Major Fontaine and his field notes.

Q. And not from an actual survey on your part?

A. No sir, I made no survey.

Q. You made this entirely from the field notes?

A. Yes sir, the Government field notes.

Q. And you didn't make it from any map at all?

A. No, what do you mean?

Q. From any map?

A. From any survey you mean?

Q. Yes?

A. Yes sir I made it from a Government map.

Q. I am asking you if you made it from the field notes, or from the map?

A. I had to have field notes first, to locate a corner, no man in God Almighty's world can make an accurate survey without you have a connection over on the Mississippi side, which was absolutely an independent survey, independent range line, and independent meridian.

176 Q. And made how long afterwards?

A. And made seventeen or eighteen years afterwards, when the river hasn't made any changes.

Q. Now in '48, which was sometime then after the Mississippi survey, you don't know from these lines where the river -as then in '48?

A. No, except those parties that were right on the ground can tell exactly.

Q. So, in delineating these channels here, you are simply delineating where the river ran at one time?

A. I am delineating it from the surveys made up this channel as it appeared twelve years ago.

Q. Who by?

A. By Major Purvis, and Major Fontaine.

Q. Where are they?

A. They have got an old map here.

Q. Let me see it, just a minute, now you say Mr. Schlierholz you made this map here from this map?

A. From the Mississippi River survey, as well as from the notes I had of the northern portion of this map, and a deed that I had in my possession, which described somewhat the boundaries here.

Q. And who made this map?

A. I don't know, I found it among some old papers, have no idea who made it.

Q. Use that in connection?

A. There, about a mile and a half north.

Q. Now you say, you have a survey made of the Arkansas shore in '33?

A. No sir I didn't say that.

Q. Didn't you testify to that this morning?

A. No sir I said I put in a line of '33, has to be shown on the map.

Q. What map?

A. Of '33, where it run parallel with the shore line of the Mississippi shore.

Q. Where is that? Show me that?

177 A. You have it on the exhibits, I will get it; right out there is one, there is another one.

Q. Now, show me, you mean you delineated the channel, you mean you ran it our here.

A. Let me hold that right here and show you, here is Section 30, and here is Section 19, here is the line of the Arkansas shore coming around like this Mississippi shore, it runs right here just exactly, making the field notes on the west line of Mud Lake and then it stops right here in '31, this survey here that is four chains from the corner of 31 and 32, now you will see this width of the river here and transpose the same width of the river as this right here on the scale here, and by the Government, and made the river on this map just as wide as the river is shown on this map.

Q. Don't you know, Mr. Schlierholz, you have been looking at these maps, you say, and you have been working in the Government Land office?

A. For the United States?

Q. And in the office of Little Rock, wherever you worked don't you know when these people, when they made that map didn't intend to delineate that map right here?

A. Yes sir.

Q. How do you know they did?

A. From my personal knowledge of the work in the United States office.

Q. In '36?

A. Laid down to the survey and they had to follow those rules and had to ascertain the width of the river.

Q. Is there any way for you to tell from that how wide that river was there?

A. That river there——

Q. I will ask you another question: will you state on your oath, and from your experience as a surveyor that you would say from this map that river was as wide on that map, and no wider?

A. I would say that river wasn't wider than sixty chains, about the average width of the river was sixty chains about that time.

178 Q. You just drew that line from that little sketch of the river on the outside?

A. Yes sir.

Q. Don't you know that's simply a line drawn there by a surveyor to show the Mississippi River, don't you know every map has here, that the river is very near the same width where it shows that little line?

A. Not where there are islands, take the river right here, it is a mile wide.

Q. Do you mean to say they surveyed here, and know how wide that is?

A. Except they were told in the manner of surveying they should take care of all islands in the river at navigable streams.

Plaintiff objects to what they were told, unless he can show what they did do.

(The Court:) I sustain the objection.

Defendant excepts.

Q. There is no way to tell from this map, except from what you propose to know that this river is that wide in there, there is nothing on the map to indicate it?

A. Except the scale by which it was formed.

Q. Do you mean to say this side of the river on the outside is drawn by a scale?

A. Yes sir, that is supposed to be, that's what the men are told in the office.

Q. Who supposes it to be?

A. The Government of the United States, and their instructions.

Q. Have you any such instructions as that?

A. I have them in my home.

Q. Have you got them where you can get them?

A. No sir.

Q. You drew this course of the river, judging from the outside sketch of that river?

179 A. Yes sir.

Q. And you called that then an Arkansas survey of '33?

A. That's why I put down probable shore, might have been five-tenths more and five-tenths less.

Q. So, I repeat again, you drew the Arkansas bank in '33, because you drew it from the outside sketch of the river as made by the surveyors of Mississippi, the U. S. Government surveyor.

A. Not the surveyor of Mississippi, the United States Government surveyor.

Q. I say in Mississippi?

A. That's right?

Q. I will ask you to take your scale and measure from this shore here to the old shore here, and see how wide it is, that is, for the information of the stenographer, that point is, taking it from the center of Section 11, Township 28, Range 5 in Mississippi to where the old line marked probable shore of Arkansas in '33 crosses Dustin Pond?

A. Fifty chains that point.

Q. Now measure that from the same point?

A. That is fifty-five chains.

Q. How much difference?

A. About five chains.

Q. And so then your map there disagrees even from the date?

A. I told you I made it about fifty-five, or fifty chains.

Q. You take an oath it was fifty?

A. Several others, it is fifty-five from the map.

Q. You take a general average?

A. Yes.

Q. And just drew that river from an average?

A. General average, like it is always done in those cases.

Q. Now this Old River here where you have drawn a channel, you say you never were down here before?

A. I said that I never had been there until November of this year down here; I have been up here to Friars Point before.

180 Q. And you are able to swear just from looking at that, the few days you were down here and tramping over to where this timber was cut, you are able to tell from that and swear here before this jury that this Pecan Lake, or Old River, as you call it on your map, central, or thread of the river, I believe you have got it, you are able to tell them positively that that wasn't caused by a break in the river here, right in here into a cypress break-, as testified to by one of the witnesses?

A. I have practically said that that couldn't have occurred for this reason: had the break occurred as the old darkey stated, and had come in with such a force as to scour out the river ten or fifteen feet, it would have cut right across here, and gone down in the low place called swamp below here and made another cut-off in the Mississippi River.

Q. Why, do you say?

A. Because the natural inclination of the low ground runs that way?

Q. Did you take the levels?

A. I could see without taking the levels.

Q. Do you say the land here is lower than the bottom of Pecan Lake?

A. Pecan Lake, at that time, was very low, and the water rushed in and scoured it out very deep, if that had been the case, and such a force, would have come in a southwestern direction, that it must have come, according to his say so, it would have made a bend of forty-five degrees, an elbow like that, but it would have showed, according to that natural inclination, into that low swag in here and

gone down into the cypress brake and down the Mississippi River some four or five miles below here.

Q. It would have had to break the levee?

A. There was no levee there.

Q. The levee was there?

A. If the water came in such force as he said, that levee he
181 spoke of wouldn't have been more than a mole-hill.

Q. Not knowing how deep this was in here as a cypress break, not knowing how high this levee is, you are yet willing to come up before this jury and swear that you wasn't a prong into that break and further down Pecan Lake wasn't the deeper part of the cypress break?

A. For this reason: it is an impossibility for the Mississippi River, and for anyone who knows how the water of the Mississippi runs and the current it has to go to work and run in a southwestern direction with full force to scour ten or fifteen feet out of the break, and then immediately make a turn in an elbow there, that's against all nature.

Q. You testify that it scoured out?

A. No sir, I didn't test-y it, the negro testified it.

Q. Why, did you say it did scour it out, you said its caving bank there, and the water rushed in there with a rush, and that's what, caving bank?

A. I said the river came down here and caved when the river——

Q. Was that the central part of the current?

A. You had the original bank of the river right here, and it commenced to cave until that cut-off occurred.

Q. Now, when it caved out to here, and when it was caving in here with such a force, why didn't it go where you say it was low?

A. Evidently at that time the river made a cut-off and ceased this bank from caving, as it must have been caving up until the time the cut-off occurred.

Q. While we are speaking in theories and evidently, let me call your attention to another matter, you heard Mr. Mashburn testify that he went through here in a boat, and then he went into this end of it, and walked along here and going again in a boat in the connection between Dustin Pond and Pecan Lake?

A. He went from this place here.

Q. And walked from here down to Pecan Lake?

182 A. I don't know anything about this over here.

Q. I asked you the proposition; you heard him testify to that?

A. I heard him testify he went in a boat from there.

Q. You didn't hear him testify that he went from the connection in here?

A. I heard him testify that he saw a small connection of water here that run down, that's what I heard him testify.

Q. Did you hear Mr. Mashburn testify from his map here, which I present to you, that this small prong of water which extends down to the northeast, or southeast from Dustin Pond, and he has got

marked, on to Pecan Lake, that at the time that he went there, that there was a physical water connection all around it?

A. I heard him state there was a narrow channel.

Q. Now, if there is such a channel there, and that channel is a well defined channel, and there was water in it, will you say positively, that the river didn't run at that time right through here where you have got the probable shore of Arkansas in '33, and that this land in here was an actual island at that time, and that when this cut through here down into Pecan Lake that that was a bare cypress *break* on this side of the island, and when the river cut in over here it made an entire change, an island.

A. If there had been an island here, the United States Government would have marked it, there is no such mark on any Government plat of any such island, except here, and it would have been absolutely impossible for that island to have existed there after that survey of '33.

Q. I am not asking you about '33, I am talking to you about '48 when this river cut off there was no survey made here in '48 was there?

A. No sir.

Q. Didn't you testify on the witness stand a few minutes ago that in fifteen years nobody knew how that river changed?

A. No, in one year.

Q. Is it not possible, if this surveyor testified to those
183 physical facts, and if he has testified there is a well defined channel between this land here and the original Arkansas shore here, that that river ran in through there sometime about the year '48, I don't speak of '33 when that survey was made, or '15 when this survey was made, but I speak of '48?

A. The simple fact that the contour of the northwestern part of the Old River, which runs along Township 28 and 29 North, Range 4 West having changed its course from a half a mile to nearly one mile toward the west and made it a depression towards the south and took land away from Section 11 and 10 and 3, shows that the river could not have formed an island in here, but the accretions west, out towards this way and the river, formed right there where the old bed of the river is now, what you call Old River, and we call Pecan Lake.

Q. I notice you have delineated in red right below Section- 22 and 23 in the State of Arkansas, what was delineated also in the Government maps as an island?

A. Yes sir.

Q. You have delineated that in skeleton, in red?

A. Yes sir.

Q. I also see you have drawn your old river channel directly through that island, the Government survey, why did you do that?

A. Because of the map of '33, and taking that river to be fifty five to sixty chains wide, that river has gone and cut off some of that island and put it in the river of '35, and today this old channel up here runs through a neck of the old line of '33 and takes off one there on the island and puts it over on the Mississippi side.

Q. Now, then, you couldn't say then that between this channel in here, where you have got marked old channel that the Rust Land & Lumber Company don't claim any of that land?

A. Don't claim any of that land in here; never did, outside of this old channel here, never did.

184 Q. Now, while we are speaking of lands, I notice you introduced some tax receipts, you say you paid the taxes on these lands?

A. The Rust Land & Lumber Company paid them, I have charge of that.

Q. Now, I will show you this tax receipt that you added up here a while ago, it is 1912, marked Number 22, I see that you have added up 1,419 acres?

A. Yes, that's the total amount we own on the island, according to the tax receipts without the accretions.

Q. Now, this little section- 23 and 22, at the time of the original survey, how much did it have in it?

A. I expect it had about 75 or 80 acres altogether.

Q. Twelve in one and fifty-six in another.

A. That's about right.

Q. What are you paying taxes on Section- 23 and 22, how many acres?

A. Sixty-eight and one half acres.

Q. How much in Section 23?

A. That is altogether in 23, and 22.

Q. How much in 23, are you paying?

A. 12.7.

Q. How much are you paying in 22?

A. 56.33.

Q. How much are you paying taxes here in 1912?

A. Same land.

Q. 56 acres and 12 acres?

A. Same land.

Q. How about that in 1911?

A. Same land.

Q. Never did pay any taxes on those accretions down here?

A. No, but we paid taxes on lands the river had taken away from us to a great extent.

Q. I understand, I want to know if you paid taxes on this land in here?

A. Because we haven't been assessed.

Q. That is the land in controversy?

A. There is a great many accretions haven't been assessed.

185 Q. There is a whole lot of that land in controversy on which you paid no taxes?

A. Yes sir.

(Fitzgerald:) I move again to exclude this map exhibit 4, your Honor has heard the testimony here and I don't think it is perfectly fair to us to have a map introduced here which has been

drawn by a half dozen different people that is taken from maps he knows nothing of.

(The Court:) I overrule the objection; I think all of those questions are questions for the jury.

Plaintiff excepts.

MAJOR LAMAR FONTAINE, a witness introduced for and on behalf of the defendant, having been first duly sworn, testified as follows, to-wit:

Q. Your name is Major Lamar Fontaine?

A. Yes sir.

Q. Do you live in Coahoma County?

A. I do.

Q. How long have you lived in the Mississippi Valley in the State of Mississippi?

A. Since '68.

Q. Have you ever, prior to that time been in the Mississippi Valley?

A. Good many time, sir.

Q. What is your profession, Major?

A. Civil Engineer and Surveyor.

Q. How long have you been a civil engineer and surveyor?

A. Since, on my hook, since the 20th of June '49.

Q. Are you acquainted with the lands on which the timber in controversy in this suit was cut and the accretions surrounding and adjoining it?

A. I have never been on the plat of ground, the exact spot where this timber was cut.

Q. Have you or not, been on Horseshoe Island?

A. Yes sir, good many times.

Q. Were you acquainted with the course of the river there in '49.

186 A. Yes sir.

Q. When did you first see the river at that place, Major?

A. Both in '37 and '38.

Q. Did you ride along the river and see it along there then in '37 and '38?

A. In '37 and '38 we were camped at what is known now as Dundee in Tunica County, on the Yazoo & Mississippi Valley Railroad on the bank of Bear Lake, my father and Jake Thompson owned about ten thousand acres that extended from the north end of the present town of Dundee, down to Muddy bayou just north of Lula; it was known then, we named it Red Bud where we were camped.

Q. When you say we were camped, to whom do you refer?

A. I mean my father, Jake Thompson and two surveyors and thirty or forty negroes and four Indians.

Q. On what occasion did you go to the bank of the river at Horseshoe Point at that time?

A. The Indian who took charge of me in hunting, I was but a boy about 8 years old in '37, and we would ride from that place

down Phillips Bayou to Moon Lake, cross over the pass on the east side of Moon Lake down by Delta Point in this country and down by Friars Point and down this side of the river, the east side of the Horseshoe Bend and around the tow of the Horseshoe Bend down to Ward Lake, where there lived an Indian called Chief Charlie, who owned a plantation there then of about 320 acres in cultivation, and we would hunt with Charlie, sometimes stay all night at his house and then go back up to our camp. We were camped at Dundee about six months altogether, the negroes were deadening the lands there around Dundee, south of it down towards Lula, and the surveyors were cutting the lines out again. My Grandfat-er at the time was surveyor General of Public lands south of Tennessee, and he sent these two surveyors in there to mark out this land that they had purchased from the Government, that my father and Jake Thompson, purchased, and sometimes we would ride
 187 those trails that they cut in those days up here, made several trips down to see old Charlie, and they were kin folks of an Indian that was with me, the only fat Indian that I ever saw, weighed about 270 pounds, named Fat Bob.

Q. Major, I want to ask you if you saw that bank, the Mississippi bank of Old River or not of the Mississippi River around south of Horseshoe, around Horseshoe Bend?

A. Our trail—

Q. After the cut off was made in '48?

A. I see that everything is registered here as the cut-off took place in '48. I passed through the cut when the first steamboat that went through the cut-off in '49, there was a flat boat in front of us, that instead of going down through the cut off, turned in towards Arkansas shore to the south and took the chute that went in that direction, because there were a great many trees falling there in the river where the meandering of the banks, undermining of the banks was taking place, trees were falling, some fell over a hundred feet long and it landed at a field that the cut-off had gone through and stayed there, and we didn't go through the cut at that particular moment, but turned down on the Mississippi shore and cut across to a little toe head that was right,—I see at the end of the line between 30 and 31, in Town. 28, or 29 Range 4 West. There was a small island there and the man named Miller had a wood yard right opposite of the upper end of that island.

Q. That was how far from the south point of Horseshoe Island?

A. It was about, let's see, about three miles north of it.

Q. I mean south of Horseshoe Island, how far was it from the main land?

A. Well, I say this place was about three miles north of the tow of the Horseshoe Bend, this chute.

Q. I am asking you now about the banks on the Mississippi shore, did you examine those banks, or not, did you see them?

188 A. Well, I didn't in the steamboat trip.

Q. I mean in '49 at all?

A. I say, I didn't examine them then, but in the Fall, in the Winter of '37 and '38 those banks were crumbling a little, not a

great deal, but you could see in riding along that there was fresh dirt caving off in that time.

Q. Well, now, in '49, the year after the cut-off had been made——

A. I didn't see the banks then, I don't know how the banks were in '49.

Q. How were they prior to the cut-off, were they caving banks on the Mississippi side or the Arkansas side there?

A. Well, I would call it the Arkansas side because that was the Arkansas town in Township 4, Range 4 East of the principal meridian.

Q. I mean right south of the Arkansas shore, at that point on the Mississippi side, were the banks caving or not?

A. I couldn't say that, we didn't go that far down, because we didn't go any further west than Old Port Royal, which stood about thirty rods east of the present head of what is known now as Rice Bayou, that is as far west as we went, and on the map, it is shown by the surveys there that that was about 220 or 230, may be 250 yards east of the range line between ranges 4 and 5 west in Township 28. We didn't go beyond that though, we started to go across the open waters, a broad open space, you could see a willow bush up in the top of it out of the water to the north of us next to the Arkansas shore, but the,—we intended to go that way at the start, and the pilot told the captain that the head of the mouth——

Q. —Never mine——

A. —Was filling up with trees and things, and we had better go back the way we started.

Q. Did you ever make any surveys of Horseshoe Island, Major?

A. On part of it, I have not all of it, sir.

Q. What part of it did you survey?

189 A. I ran as far south as the lines between 22 and 15 and 14 and 23.

Q. Did you go down to the south end of the accretions, or not?

A. No sir.

Q. Did you ever go down there?

A. No sir, not on my surveys, I never went further south than that.

Q. Than 22 and 23?

A. Yes sir.

Q. You don't know, of your own knowledge, anything about the formation down below there?

A. I could see them, sir, from where I was, the timber was sloped off toward the southwest.

Q. Can you tell anything about the character of the timber from what is now called Old River, or Pecan Lake going north towards the river?

A. Well the timber slop-s, the old timber is next to the old Arkansas shore, I traced down to the Government corners cut them out, cut the chips out on the line between 15 and 22, and I cut the corners out, that is the line trees, not the corners between 10 and 15—I never surveyed.

Q. What I am trying to ascertain, Major, is if you have any

knowledge of the character of the timber on the accretions south of 23?

A. I said only from my observation looking through there and walking down there, not surveying.

Q. I understand——

A. But, I have been down in it several hundred yards, I don't know how, I didn't measure the distance.

Q. How was the timber, if you know as to whether it grew smaller as you went south?

A. Yes sir, it grew smaller as I went further south.

Q. How far south did you go?

A. I went several hundred yards, just walking through looking at it with Mr. Fitzhugh.

190 Q. Did you go down as far as Old River?

A. Went in sight of it.

Q. When was that?

A. 1901.

Q. How wide was Old River at that time?

A. It was about, from ten to twelve chains wide.

Q. That would be how many feet?

A. Well a chain is sixty-six feet.

Q. Ten or twelve chains wide?

A. Six hundred and sixty feet in some places and eight hundred in others, but that I never measured it.

Q. You never measured it?

A. Only from a short time ago from this side, along the levee.

Q. Can you state the character of the banks of Old River?

A. Yes sir.

Q. How were the banks?

A. The banks on the south side were very high and the other sloped to nothing.

Q. Sloped right down to the water?

A. Down to the water until you could see little bunches of grass tips out of the water, little stumps of dead.

Q. How was the timber going from Old River north, did it grow larger or smaller?

A. Gradually grew larger until you got upon the ridge on a line between 15 and 14, there you got into a cane and elm and Oak, gum, old timber, five and six hundred years old.

Q. Have you ever been to the point south of what is called Dustin Slough, Dustin Pond?

A. No sir, I never saw, never have seen it at all, I have had lines run here last, this year right up from the southeast corner of 11 for a mile and a half, I didn't encounter any water there, and my son did the surveying.

Q. Are you able, or not to state Major from your observation and experience in these kinds of matter and from the observations
191 you have taken on this land, how these formations were made.

Plaintiff objects to that.

Court overrules the objection.

Plaintiff excepts.

A. Yes sir.

Q. Explain to the jury from your observations how these accretions were formed, coming from the island, if you can, to the north bank of the Old River?

A. Well, accretions always form in the rear of any obstruction that the water can't move. A heavier body dropped in the river snag, or a steamboat will form an island, and it will accrete from the north end down the river and the accretions will gradually spread out as the current is retarded, when the current is choked all the mud and sand and silt and voluble material in solution of the water, when it becomes still will drop upon the bottom, and as it rises to the surface of the water, why the little willow seeds and cottonwood seeds that fly in the air, they drop down there, and they will grow up in thick bunches like hair and as the river rises, and more silt and sand is poured down the little fibers and little weeds that grow up that way, little bushes will bank the sand and silt away out of the water and deposit them, and gradually grow wherever a current is checked, that's the effect in all streams.

Q. Can you explain how these particular accretions were formed there, Major?

A. On that same plan in the bends of the river where a bend is made, like my hand that way, the current running against the opposite bank here cuts this out; well a sandbar, the sand forms in a slop- down this, and pushes the water faster, by static pressure, the deepest water is near the front bank, and the sand slopes down gradually that way and forces it; and as it slopes down, the still water is behind this sand, and it drops it that way, and the accretions are so formed and pushed on as the river bank on the opposite side comes away, the sand doesn't give way and all the friable material that is in still water, and as it forces the water against this bank like a wedge force in there, the bank isn't as strong because it is composed of a great many kinds of mud, sand and gravel, and the gravel is light, and the water, it gives away, drops down, and the mud drops upon it, and then there is a muddy place and that water is whirled around in the force of a current, and the heavier particles are deposited in the still water away from this current, drops in there, and it gradually, the accretions gradually form, the erosion of the current itself.

Q. I want you to apply the principles to the particular accretions here, and explain how those particular accretions were formed from the Island down to Old River?

A. Will the sheriff take this map off, and let me have the blackboard under there.

Q. Yes, he can do that.

A. That represents, (Referring to drawing on blackboard) the two shore lines of '33, Mississippi, and 1835, this represents Arkansas in 1816; this dotted line, of course, it is not measured to scale, but just to show the action of water. This isn't the maps of it.

Q. Now draw the Mississippi River in the cut-off, Major, the line of the cut-off of 1848?

A. Now, according to the theory that I embrace of banks giving

away by sandbars forcing them towards the opposite bank, they always leave a mark behind them. We see here, a little island, small island there, a sandbar. Now, you will notice the indentation in the opposite bank; that sandbar makes out, follows that on account of still water opposite there; now here is a sandbar formed from the point of this island, this is supposed,—I won't draw section lines across it, for I want to measure it from this sharp point right here, this sharp point, and this coming in here, this was bound, with that, to have filled up in that position, and you can see that this

193 checking of the water here, flowing against this, threw the mud over on this side, and this is called Mud Lake; now, this checking of the water, if it ever went through there, filled up in here, the mud was thrown by that protecting point that it couldn't wash away and it put the mud in this side, it forced it and threw the current here, then it cut in this way. Well, the rush of the water then, when it couldn't cut further here, turned this way, and it acts in this way.

Q. Along what line, Major, so the stenographer can get it in the record?

A. On the Mississippi shore, on the south end of the Horseshoe, when the water, when the mud filled in mud lake, the current was changed from Mud Lake and shoved southwesterly, and we will say that this was the, this point that I marked and call "A", marked on the plat as "A", was a range line we will say, and "B" was the head of Sunflower River out of Mud Lake, or Rice's Bayou, it is called now. This rush of water here, cut this bank first; this mud and sand came down filling in here and forced the river to the westward and passed the line, the range line and cut in to the south on the Horseshoe on the Mississippi shore. The accretions formed, the still water, on the Arkansas side, followed around in the direction that you see those points, marks from the island.

Q. Where then was the last stand on the river, Major?

A. The last stand.

Q. Yes?

A. I couldn't tell you that because the bank, this section line, the range line run about, here, sixteen chains and something. This stand, coming away now from this map here, take this island away this filling up in here, this checking of the mud in this position, threw the channel in that direction and took off this point, and the river changed in this direction, when this Old River filled up, cut off a piece of this of Arkansas, southwest point.

194 Q. How did the accretions form?

A. On this side, on the Mississippi, southeast and then became solid, then the accretions begin to form directly south of the old shore line of Arkansas, and cut in deeper into the Mississippi shore this way, and gradually increased until it came down to the north end of what we call Section 11; and, in the north end of Section 11 was the deepest cut in the whole of the shore line of Mississippi in Township 28, Range 5 West, and it cut into the lake that is shown on the original Government plats, a lake that ran parallel with the Mississippi River and turned southwesterly. Well, the

waters, as they accumulated in the rise here sweep in here and come down that old lake, and make it a larger lake, and when that was taking place——

Q. The lake you spoke of, what is that Major, delineate it now?

A. Old River, or the northwest end of it; the north end of it was known as Pecan Lake. I have heard it called Pecan Lake.

Q. What is the difference between Pecan Lake and Old River?

A. None.

Q. The same body of water?

A. The cut-off, the check was going into this, the outlet was going southwest in the old lake, that lay west of the original bank of the river in Section 11 on the west side.

Q. Now Major, I will ask you if you have ever seen this map, which was introduced in evidence?

A. I saw it up here, sir.

Q. In connection with the testimony of the other witnesses?

A. I saw it on this place, it doesn't show what I wish to show, if you will hand me the township map——

Q. What I want to ask you, admitting that map to be correct, if you can state how these formations were made between Dustin Slough and Old River?

Plaintiff objects.

195 A. I don't know anything about any of those sloughs, nothing in the world, I don't pretend to know, because I have never been down and examined the topography of the country, but in the Government plats, I can show the lakes that the original bank cut into, and let the jury look at them. You will notice there on the western line, and I can explain to you, that this half a mile post on the west boundary of Section 11 is standing yet with the Government marks on it, was Sunday a week ago, the original line.

Q. That is Arkansas you are in now?

A. No sir that is in Mississippi, I am in Township 28, Range 5 West. The river, the south end of the Horseshoe cut into this lake that you see upon the Government plat, and started a current down this direction southwest. The cut off took place before that was sufficient to make a river to make the cut off there, the cut off came down at the north end of the Horseshoe and checked this flow of water there and filled the place up. Now, as this river cut into the southwest on that shore line of '33, the shore line of 1816, of Arkansas followed the accretions and followed southwest all of the way where you see those striped marks in a southwesterly direction, entirely keeping up the equilibrium generally of the width of the river.

Cross-examination:

Q. You say you have never been down there at the Dustin Pond?

A. No sir.

Q. You can't testify as to that?

A. No sir, I only had my son to run a line through.

Q. These accretions that you speak of that have formed in there, all of that bed of the lake now, have been formed of course by high waters running through there since the cut off of '49?

A. No sir, I couldn't say that.

Q. You don't know when they were formed?

A. No sir, I can only judge from the shore line of '33 there and the shore line of Arkansas in '16.

196 Q. Well, take your point "A" there on your map, how wide was the Mississippi River between that and the Arkansas shore when you saw it in '49?

A. I couldn't tell you, sir, because the river was up so that you couldn't see the shore line, only willows, it looked like it was two miles wide across here, looks like this whole country was under water, and be impossible for me to tell the shore line.

Q. You could see the Arkansas shore though?

A. No sir, oh, you could see big timber on it.

C. W. GRIFFITH, a witness introduced for and on behalf of the defendant, having been first duly sworn, testified as follows, to-wit:

Q. Where do you live, Mr. Griffith?

A. Memphis, Tennessee.

Q. What is your business?

A. I am an engineer, and I specialize in the cru-sing of timber and surveying of various lands.

Q. You have, ever been in the employ of the United States Government?

A. Yes sir.

Q. What capacity, and what length of time?

A. I was employed for about three months when we were making a survey of the caving banks of the Mississippi River from Memphis to Lake Providence.

Q. Are you familiar with the land known as Horseshoe Island delineated on that map there?

A. I am.

Q. Have you ever been over it?

A. I have.

Q. When?

A. In August and September 1912.

Q. As well as you can tell from that map, is that a correct representation of that locality?

A. Yes.

Q. Have you examined the map carefully?

197 A. I have.

Q. Well, when were you last over that land?

A. In August and September 1912.

Q. Now, Mr. Griffith, taking the point there, the eastern point of Dustin Pond going towards the north bank of Old River, I will ask you what about the size of the timber as you go towards Old River, is there any change in the size of the timber as you go in that direction?

A. The timber adjoining the point is larger than the timber adjoining Old River.

Q. Does it gradually get smaller?

A. It seems to go in steps, you will go perhaps a quarter of a mile, and it will be approximately the same size, and go another quarter and it crops off perhaps two inches.

Q. Now, immediately east of the point of Dustin Pond, what about the size of the timber?

A. I will take approximately where my hand is in the center of Section 15, and covering that field, you will find in there, timber that is apparently over a hundred years old, and the cottonwoods in there, where there are any are so old that they are dying of old age, and you will find timber in there that you won't find any place else on the island, you will find oak and sycamore, and you will also find a bed of cane right around in there, and running right close up to the edge of this field you will find some oak trees right at the south bank of that slough in there, indicating that that land never has been washed by the Mississippi River inside of a hundred and fifty years.

Q. Now, what about the north bank of Old River, what is the character of that bank?

A. When you get within about three hundred feet of it, at the time I was in there in August, a dry time, you can't get into the water, we had difficulty in getting down there to the edge of the lake on account of the water.

Q. Is there a gradual slope down in that direction?

A. Yes sir, from the lower end of this cane line that I
198 spoke of in here in the north side of Section 22, and where that old timber is, there is quite a decided jump off in there, and then it is gradually lower here with the small ridges in there characteristic of mud land.

Q. What about the south bank of Old River, what is the character of that bank?

A. It is a steep bank, eight to ten feet high?

Q. Now how many connections are there between Dustin Pond and Old River, water connections?

A. One.

Q. Where is that?

A. Right here.

Q. At the point delineated on this map?

A. Yes sir.

Q. Now as you go westwardly along Dustin Pond, and northeastwardly, is there any body of water which connects Dustin Pond with Old River?

A. No sir.

Q. Have you been all through there?

A. I have run back and forth across this island from the north from the extreme south, and along the line that comes in here something like that which is known as the McKee premises at intervals of six hundred and sixty feet.

Q. So that, I understand you to say that you have been over

this land here between the northwestern bound of Dustin Pond, as shown on this map, Exhibit No. 4, and the north bank of Old River, and found no water in there at all, no water connection, is that correct?

A. Not connecting Dustin Pond.

Q. Not connecting Dustin Pond with Old River, is that correct?

A. Yes sir.

Q. I notice on this map, exhibit 4, a channel is indicated from Old River northeast to what is now the Mississippi River, and also northwest of what is now the Mississippi River, have you ever followed that line that is indicated on the map out in that direction?

199 A. In making, in running my trips back and forth across the island I have checked this channel all of the way around and up to where this McKee comprimises line comes in, from here on, I only know it by observation and walk back and forth from the island to Friars Point.

Q. You say you have traced it from here around, just describe that as shown on the map, so it can get into the record?

A. From the northwest corner of the island, where the Old River runs into the Mississippi River, I have checked the line of Old River as exhibited on this map, around to approximately the northwest corner of Section 6 as shown on this map of Coahoma County.

Q. Now, what is the nature with regard to whether or not there is a channel from the northwest corner of the island to the northwest end of what is now known as Old River, what indications of any prior channel do you find there?

A. There is a very plain channel, evidently a stream with steep banks on either side, averaging ten or fifteen feet high, with the exception at the north end of the old lake on the west side it flattened out in here, and the channel is very narrow at the time that I was in there, there was running water in there, running this way.

Q. You say it flattens out here, indicating on the map a place at the northwest end of Old River, which is marked on the map "Sandbar"?

A. That's it.

Q. Now taking the northeast end of Old River, you say that you have been across there that part of the island and seen the country in that way?

A. Yes sir, walked back and forth in there.

Q. Now is there or not any indication of an old channel from the northeast end of Old River, up to what is now the Mississippi River?

200 A. At places where I have crossed it, you will find ditches of water perhaps a half a mile long in there, and just below, down here, there is one particular place that I remember three-quarters of a mile long, four hundred and fifty feet wide, clear open strip of water, and I found the same condition down in here little lakes, lake along here, and this channel clear into the river is open with the exception of a sandbar right adjoining the river.

Q. Now you say you found strips of water that way, what about

the places in between these bodies of water, is there any indication of a channel between these bodies of water or not?

A. There is, just seems to have filled in there, here where the water is.

Q. What kind of a channel, what indications did you find?

A. Definite bank on either side.

Q. Are you a surveyor too?

A. I am.

Q. You made any surveys in this neighborhood?

A. I have.

Q. What have you done?

A. I went to an original corner on the Arkansas shore where the old Government marks show, the chips had been taken out, and I ran down this line between section on the west side of Section 3, set off a base line a half a mile long on this side of the river, with the aid of the transit, I obtained my distance across the river, and this section line on this side ran on south here, and located the southeast corner of Section 3.

Q. What did you find the width of the river to be at that point?

A. Something over four thousand feet.

Q. What connection, if any have you, with the Rust Land & Lumber Company?

A. Only temporary.

Q. How long have you been connected with them?

A. I have been employed by them three times for the purpose of cruising timber and making a survey.

201 Q. Now Mr. Griffith, between the northeast point of Dustin Pond and Old River down here, in going over that country in there, did you find any indications of an old river channel in there?

A. I will have to take exceptions to a former statement that I run strips every six hundred and sixty feet, when I got in here which would be in the west side of Section 22, and the northern side of Dustin Pond, the mud and water became so bad that there was a space of about 40 acres across in there, that I couldn't get on, that is all very low on the northern side of Dustin Pond.

Q. Taking this country in here between the northeast corner of Dustin Pond and Old River, what about that?

A. The north side of 22, and the south side of 15, east of this slough shows, running north and south on the east side of the field is very high land from here, it indicates made land perhaps sixty years old, from here out to the shore line of the old river, and also made land ten years younger.

Q. Is there any indications of an outlet from Dustin Pond on the north up that way?

A. There is a slough that runs on up here, and in August, we found dry walking across it, right across there, we were camped in that field.

Q. I didn't get exactly the directions of that slough, call the directions there?

A. This one here?

Q. From the slough you last referred to?

A. It runs from a northeast point of Dustin Pond as shown on this map No. 4 and north two degrees west, and the water, in the dry season, ends at the lower side of the field.

Q. It is on the west part of the island, isn't it?

A. Yes sir, it runs up this way.

Cross-examination:

Q. You say that the lands just east of the lines running between Sections 22 indicates made land?

A. Yes sir.

202 Q. That is, that at one time, so it was indicated to you that the river ran close to that line?

A. Came around in here.

Q. Now you wouldn't say, would you Mr. Griffith that there is not a physical connection on the east and south of Dustin Pond would you?

A. Yes sir.

Q. You heard Mr. Mashburn testify, did you not a few minutes ago that he walked the entire distance around?

A. Yes sir.

Q. But you are satisfied he is mistaken about that?

A. I am not satisfied that he is mistaken, I am satisfied I did walk across there dry shod, that's the only place in the island I could walk.

Q. Did you attempt to find any outlet down this way?

A. If there had been any there, I would have found it, I ran strips across.

Q. You ran strips down here?

A. Yes sir.

Q. Every six hundred feet?

A. Every six hundred and sixty feet.

Q. But you say also on the northern bank of Dustin Pond is very low?

A. Yes sir.

Q. And the land on the south bank is very low?

A. No sir.

Q. How is it?

A. It is low also, but not as low as that.

Q. How is the timber on the north bank of Dustin Pond?

A. That is willows.

Q. But, how is the timber in here, on the south bank of Dustin Pond?

A. That is about thirty-six inch cottonwood.

Q. Indicates a good deal of age?

203 A. Yes sir, not exactly older than this timber, because you will find it is dry from up the west side of the island, that the cottonwood hasn't, next to the river the cottonwood hasn't come in like it has on the rest of the island.

Q. I am asking you what the size of the timber was, you say about thirty-six inches average?

A. Yes sir.

Q. Now going west from Dustin Pond, what is the size of the timber south of 22?

A. It is about the same.

Q. Now, is there any physical fact there that shows that there was ever a river bank in here, where you say that is made land just east of the line between Section 22 and 23, 4 North, 4 S. I believe it is in Arkansas?

A. Yes sir.

Q. There is an indication that the bank was in here?

A. Yes sir.

Q. Right in there; now in following that bank down, where did you find it, did you follow it down, or did you just run your strip straight line?

A. Well, I run my strip straight across when I completed that station.

Q. You found that that bank extended down here too?

A. Yes sir.

Q. And then the current took a change right up this way?

A. This high ground, as I said, is right in there.

Q. How many acres you say is in that field, do you know?

A. I have, and there is about a hundred and sixty acres.

Q. In cultivation?

A. Yes sir.

HENRY BOWIE, a witness introduced for and on behalf of the defendant, having been first duly sworn, testified as follows, to-wit:

Q. Where do you live Mr. Bowie?

A. Live down at Millers Bend.

Q. Coahoma County?

A. Yes sir.

204 Q. How long have you lived in Coahoma County, Mississippi?

A. Well, I have been living there about fifteen years.

Q. You in the employ of the Rust Land & Lumber Company?

A. Yes sir.

Q. What kind of employment?

A. Just merely looking after their property, that's all.

Q. Do you have in your charge body of their land known as Horseshoe Island?

A. Yes sir.

Q. Shown on that map there?

A. Yes sir.

Q. How long have you had that in your charge?

A. I have had it in charge six years.

*Q. How long have you been familiar with that body of land?

A. Well, sir, I have been familiar with that body of land about twenty years.

Q. Do you know the body of water that bounds that on the south known as Old River?

A. Yes sir.

Q. Ever hear it called anything else but Old River?

A. Never did.

Q. I wish you would look at that map, Mr. Bowie, and see whether or not that correctly represents that body of land and that strip of land as you know it? This is indicated on here as Dustin Pond, this blue body down here as Old River?

A. Yes sir, I see it—Well, the map shows that, indicates the Old River al-right as far as I have heard.

Q. He meant the old channel?

A. The old channel.

Q. Taking a body of water still there that is marked Old River, does the map correctly show that?

A. Yes sir.

Q. Have you ever been all around this island?

A. Yes sir.

205 Q. Is there any indication of an old channel from the northeast corner of the island to the northeast end of the water that is known as Old River?

Plaintiff objects to leading the witness.

Q. Well, I will ask you then what the nature of the country on the east side of Horseshoe Island?

A. What is the nature of it.

Q. Yes?

A. Well, there is a kind of a flat in there on the east side and into Dustin Pond, as I have known it to be, and then on the bank of Dustin Pond, on the east side, there is some tolerably heavy timber, and then the timber runs, further around you get then, the timber runs smaller.

Q. Now, coming back here to the northeast end of Old River, and going from there up towards the present line of the Mississippi River, what do you find up there?

A. Well, I don't find anything up there of the Old River, but just the channel that I have known as the Old River channel all of the time.

Q. You do find a channel then do you from the northeast end of Old River up to the present Mississippi River?

A. The original Old River that I know.

Q. What is the nature or character of that channel?

A. Well, in which do you mean?

Q. I am talking about now from the northeast end of Old River up to the present Mississippi, do you find banks on either side or not?

A. Well, yes sir.

Q. Can you trace that channel all of the way up?

A. Yes sir.

Q. Now, taking from the northeast bound of Old River to the present line of the Mississippi River, how about that?

A. There is a channel all of the way through there, banks on either side where it empties into the main river, and where it goes into the water.

206 Q. Now from the northeast point here of Dustin Pond as shown on this map of Exhibit 4 to the north bank of Old River, have you been over that country?

A. Yes sir.

Q. Much or little?

A. Well pretty well once a month, something like that.

Q. Is there any water connection between the northeast bank of Dustin Pond and the north line of Old River?

A. No sir, not at this stage.

Q. How long do you say you have been in charge of this for the Rust Land & Lumber Company?

A. Six years.

Q. Have you ever known of anybody to make any claim, or cutting any timber on this land at this time?

A. No sir, no more than what they stole, I knew some parties to steal some timber in there?

Q. What is the nature of the bank on the south side of Old River?

A. What you have reference to?

Q. High bank or low bank?

A. On the south side.

Q. Yes?

A. Why, that's a high bank, a tolerably high bank.

Q. Did you ever know of this negro Charlie McKee, who lives down there cutting any timber down there, sold any?

A. No sir.

Cross-examination:

Q. Who do you know stole some timber down there, Henry?

A. Why there was some parties, Jack Brinner stole some timber down there, I wasn't in charge of them, be about twelve years ago.

Q. You didn't know anything about it?

A. Yes sir, I knew of it.

Q. Except what was told you?

A. I just merely seen the timber when it come out was all.

Q. You don't know where it come from yourself? You saw it come by but you don't know where they cut it?

207 A. I know where they cut this timber they stole.

Q. How do you know?

A. They didn't cut it in there.

Q. How do you know?

A. I seen it.

Q. Saw the timber?

A. Yes sir.

Q. Therefore, you know where it came from?

A. Yes sir, I know where it came from, they cut——

Q. You didn't see it cut?

A. No sir, I didn't see it cut.

Q. Didn't see the place where they did cut it?

A. Yes sir.

Q. When?

A. Right away after they cut it.

Q. You were there, and saw there was some timber cut here?

A. Yes sir, but not in there.

Q. Didn't cut it in there at all?

A. No sir.

Q. Where did they cut it?

A. Cut it right across the levee from the old crossing there where Chavanaugh used to live.

Q. Show me on the map where is that?

A. I don't know as I can do that.

Q. Wasn't on Old River at all?

A. No sir.

Q. Wasn't in there?

A. Hasn't anybody cut any timber where this was cut?

Q. These people in here cut some timber in there?

A. Yes sir, they cut some timber in there.

Q. Did you discover that cutting?

A. Yes sir.

Q. You discovered the cutting?

208 A. Yes sir.

Q. So you notified the Rust Land & Lumber Company?

A. Yes sir.

Q. Now, you say you followed out the Old River channel this way, this is going north through Section 3, then 34, you have followed that out there?

A. Been all around it, yes sir.

Q. You have never paid any particular attention?

A. Not to come down to facts, no.

Q. Well, then, you don't know the facts at all?

A. Well, I paid attention to it to a certain extent, that is to the place in there on Dustin Pond and to the banks of the river on the west side, such like as that, but when it comes to the map and go on and tell you what direction it is, that would be a different thing.

Q. You couldn't tell on the map, now running on out to the west of the island, the field, on the old island field, is there a spur run right close to that field, running down through the island?

A. Don't go through the island, no.

Q. Where does it go?

A. To the lower end of the field, and then into——

Q. Don't connect with Dustin Pond?

A. No sir.

Q. Did you ever walk all around Dustin Pond?

A. Yes sir.

Q. Now isn't there, from Dustin Pond, somewhere about this red line that I call probable shore of Arkansas in '33, isn't there a bayou,

or cut off in there that leads, come down through here into Old River, what you call Old River?

A. No, there is nothing but a flat.

Q. When the water stands in there?

A. Well, it backs from the river in there.

Q. There can be no water in there unless the river was up?

A. No, not at the cut off, there is water in Dustin Pond, but not to empty in.

209 Q. I mean this cut off between Dustin Pond and Pecan Lake, water doesn't stand there?

A. I don't know about Pecan Lake, but I know it has Old River.

Q. Water doesn't stand in there?

A. No, there is no water that leads into it.

Q. Man couldn't go through in a boat unless the river was up?

A. No sir couldn't do it.

Q. Now, up at the northern end of Old River, timber is pretty heavy right at the northern end isn't it?

A. Along the banks, yes sir.

Q. Pretty heavy, now a little over to the right of the north end of Old River, Dustin Pond runs into it, doesn't it?

A. No sir, not that I know of.

Q. Can't you get into Dustin Pond up into Old River at the north end?

A. No sir.

Q. Can't go through there in a boat?

A. No sir.

Q. Now, did you ever go along down south down in here below the field, say between two old plum orchards, you know, to the two old plum orchards there?

A. Yes sir.

Q. You don't know who put them there, do you?

A. No sir.

Q. Did you ever go along that land in there?

A. Yes sir.

Q. Is that all high land, or a swag in there?

A. There is a flat in there, a swag.

Q. Between those two?

A. But then, there is some high land in there of course it is ridges.

Q. But, there is a well defined bank up here, pretty close to the north, old plum orchard isn't there?

A. No sir.

210 Q. A quarter of a mile below it?

A. Well, no.

Q. There is no bank there at all?

A. Not that I could find.

Q. Is there any back over in here about a half a mile east of that old plum orchard showing made land out in there?

A. East?

Q. Yes?

A. Not that I know of, not that I paid any attention to.

Q. The fact is, you haven't gone all through to look after these banks?

A. No sir.

Q. You have been going through not paying any attention to the low places, or high places?

A. I was just looking after the timber.

Q. Top, or bottom of it?

A. All over it.

Q. You say you have had charge of it six years?

A. Yes sir.

Q. Of all of it?

A. Yes sir.

Q. How much wind, fallen timber have you cut down in there?

A. I expect about sixty thousand feet lay there all over the ground.

Q. I mean right in here on Pecan Lake?

A. I couldn't say just how much.

Q. Good many?

A. Yes sir.

Q. When?

A. Year before last.

Q. Tell me how far that was from Ellen Jackson's house across the pond?

A. A few trees, I suppose about between three quarters of a mile.

Q. A mile from her house?

A. Yes sir.

211 Q. In which direction?

A. Well, that would be pretty near north from her house.

Q. Was that above Dustin Pond, or below it?

A. Well, it is just here and there now that you spoke of that I cut this wind fallen, some part of it was on one side of Dustin Pond and some on the other.

Q. Was any of it on this side of Dustin Pond, on the south side?

A. Yes sir.

Q. Where did you put it to float it out to the river?

A. I put it in Old River.

Q. Isn't it a fact, it was closer to Old River than it was to Dustin Pond when you cut it?

A. Well, no, there is some of it was, and some of it closer to Old River, and some of it wasn't.

Q. Ever float any of it out from Dustin Pond into Old River?

A. Yes sir.

Q. Well, there is a place comes in from Dustin Pond to Old River isn't there?

A. In high water.

Q. Isn't there a place runs through there in low water?

A. No sir.

Q. Physical connection of water?

A. No.

Mr. HOFFMAN, a witness introduced for and on behalf of the defendant, having been first duly sworn, testified as follows, to-wit:

Q. You live here in Friars Point, do you?

A. Yes sir.

Q. How long have you lived in Coahoma County, Mississippi?

A. Twenty-three or four years.

Q. Do you know the piece of land known as Horseshoe Island now owned by the Rust Land & Lumber Company?

A. Yes sir.

Q. Do you know the body of water on the south side of that known as Old River?

212 A. Yes sir.

Q. How long have you known that locality?

A. Forty years.

Q. Been any change in the position of water known as Old River in that length of time?

A. There might have been some, very small change not of any notice.

Q. Do you know whether any fields in cultivation on that Horse shoe Island, or not?

A. Yes sir.

Q. Do you know anything about any fence on those fields?

A. Yes sir, I done it.

Q. When?

A. About nine years ago, ten years ago, somewhere in that neighborhood.

Q. Who did you do it for?

A. For Wood Cook.

Q. Who did they get the field from, if you know?

A. Got it from Dan Fitzhugh.

Q. How many fields did you fence?

A. Three.

Q. What part of the island were they located?

A. Well, the big field that is now in litigation was upon the head of the island, as I call it and about, well about a quarter of a mile below that, may be a little bit further, may be not quite so far, but say in that neighborhood, there is a six acre field, which is a negro since I have been in this country cleared up and fence it, by the name of Fred Farmer but men I had that worked for me, I then farmed there right, it ain't further than from here across the street, the lower end of it ain't from Dustin Pond, the twenty-six acre field there that I fenced.

Q. Mr. Hoffman, on this map put in the testimony as indicated by the green shade in there tinted, an old field, large one, and just below that another one?

213 A. This is the big field, that the head of the island.

Q. Yes?

A. There is another one down there, twenty-six.

Q. Those the two fields you refer to?

A. Yes sir.

Q. Is that location on that map approximately correct, that about right?

A. Well, I would judge it was, yes, that is, this is Old River as it used to be according to a survey that I was on with Lamar Fontaine, was according to the old survey. I was on with him, but Old River comes up this way, and goes along side of this field, and there is water in it now.

Q. Now this Dustin Pond here, is that a deep or shallow body of water?

A. I couldn't say how deep it is because I never measured it although I have fished on it.

Q. How long have those fields been in cultivation, Mr. Hoffman?

A. Those two lower fields hasn't been in cultivation not since I fenced them up that I know of, but this large field has been in cultivation ever since I have been in this country, forty odd years, this particular field.

Cross-examination:

Q. You say this lower twenty-six acre field, Mr. Hoffman is right on the bank of Old River?

A. No sir, I said it was right on the bank of Dustin Pond.

Q. Did you say that Old River run right up by the side of it?

A. Old River, as I said, comes up along this way and this is it, comes up along this field, this particular field, this big one.

Q. It don't come near the small field?

A. No sir, not so close, it comes within possibly two or three hundred yards, but then here it runs right along the bank, right along the field.

Q. So, how far is it from the lower end of the old field, the big field that you have got up there to the lower end?

214 A. This.

Q. Yes, how far is it to your knowledge, not as shown on the map but to your knowledge?

A. I expect it is fully a half a mile, I couldn't swear definitely, because I never measured it.

Q. About a half a mile?

A. Yes sir, to the upper end of this, and then it runs across twenty-six acres down to the Dustin Pond.

Q. You know the plum orchard there?

A. I certainly do, got many a bucket of plums out of them.

Q. How far north of the plum orchard is this little field that you are talking about, twenty-six acre field?

A. It's about to the island, now whether it is north or south, couldn't say, because I never noticed the locality or position down the island, down to the levee, you come here to the big field, you come in here from Friars Point to the big field and come right down this way.

Q. Now, when going down that way, do you first strike the plum orchard, or the field?

A. Well, you strike this little field.

Q. Now the next field?

A. Then you strike this one.

Q. And then the plum orchard?

A. The plum orchard is in this field, is in that field there.

Q. The plum orchards are in those fields?

A. Yes sir.

Q. So that plum orchard is, did you have it enclosed with a fence?

A. We did, with the expectation of putting the tenants in it and cleaning it up that spring.

Q. But you didn't do it?

A. No sir.

Defendant rests.

(Fitzgerald:) The plaintiffs move the court to be allowed to introduce one Harry Malone, whose name was not known to the plaintiffs until after the trial of this case began, and for whom a
215 subpœnae was issued at the first day of the trial of this case; but, it was understood by the plaintiffs, without any official return, that the sheriff could not locate Harry Malone. Since that time, and since the motion was made before the argument for a peremptory instruction Harry Malone, the witness, has come into the court room and is here now. The plaintiffs state to the court that they expect to show by the witness Harry Malone the fact that Pecan Lake or Old River, as it is now called, was until 1857 a cypress break-; that the river in that year overflowed its banks where it is now situated and rushed through and down the channel with such force that it broke through the connecting land, and this cypress break- and the main shore, created what is known now as Old River or Pecan Lake. We expect to prove by this witness that there was a steamboat, the name of which counsel has now forgotten wrecked just about a quarter of a mile from the Mississippi shore, and that at that steamboat, there was formed a sandbar and land, which, at the time of the breaking through into the Pecan Lake was the physical connection with the Mississippi shore. We expect to prove by this witness, that he came into this country in 1840, and that since that time, he has lived within a few miles of this land in controversy, and knows the channel of the stream in '49 when the evulsion occurred, which placed the river in its banks where it now is.

(Montgomery:) The defendant objects to the re-opening of the case at this stage, and the introduction of any further testimony because at the calling of the case on Monday afternoon, the plaintiffs announced themselves ready for trial, and no application was made to the court at that time, or has been at any stages of the trial for any delay on account of the witness until this morning, and on yesterday afternoon, the defendant having closed its testimony and rested, the plaintiffs announced that they had no further testimony, and released their right and rights, and the court adjourned until this morning to hear argument upon the law of the case, and being necessary to submit the case to the jury on the evidence that had been
216 concluded both by the plaintiff and the defendant, there never having been at any stage of the case until today an application for delay on account of the absence of the witness, and

therefore, the defendant insists that the case be not re-opened at this time. The witnesses for the defendant are all excused, and it wouldn't be justice to the defendant now to re-open the case and introduce further testimony.

(Fitzgerald:) Are not all of the witnesses for the defendant here?

(Montgomery:) No sir.

(The Court:) Did he testify to anything with reference to the channel of the stream in '48?

(Montgomery:) The witnesses didn't testify to the channel of the stream of '48 but we don't know what he might be able to testify about the physical appearance there.

(The Court:) This morning at nine o'clock when court convened, the plaintiffs asked that the case be passed until a witness Lige Miller could be obtained, which the court refused to grant the plaintiff, and they had announced ready for trial. Since the witness Malone is not in the court room, and the court being of the opinion that no damage will be worked to either of the parties, will permit the introduction of this testimony.

To which the defendant excepts.

HARRY MALONE, a witness introduced for and on behalf of the plaintiff, having been first duly sworn, testified as follows, to-wit:

Q. What is your name?

A. Harry Malone my name.

Q. Where do you live Uncle Harry?

A. Down to Hill House.

Q. How long have you lived in this country?

A. Well, I lived here ever since we come here in '49.

Q. How old are you?

A. Born in '32.

Q. Do you know the country, Uncle Harry, in Horseshoe Bend?

A. Yes sir.

Q. And Miller's Bend, in there in the cut off?

217 A. Miller's Bend?

Q. No not Miller's Bend, Horseshoe Bend?

A. Yes sir.

Q. Did you ever live close to that land in there?

A. I know the land from Moon Lake, to Concordia on the river.

Q. Where is Concordia?

A. It is below, a way below.

Q. Below in this County?

A. It is in Boliver County.

Q. Where were you living in '49?

A. We come here in '49.

Q. Who did?

A. Goodloe Malone.

Q. And you, you were his slave?

A. Yes sir.

Q. Do you know the place now that is called Pecan Lake?

A. Yes sir, I remember a place called Pecan Lake.

Q. Do you remember when was the first year that you ever know that lake is in there, or that body in there?

A. '49,—'49,—'51, along about '51, when we come to the bottom, I was errand boy, I walked around the place always done traveling for doctor, or anything.

Q. What sort of place was this Pecan Lake, when you knew it?

(Montgomery:) We object to any questions with reference to the physical connection there, because it is direct testimony, and not in rebuttal, the plaintiff's case is to be made out on the proof of physical conditions, if made out at all, and the defendant's proof is addressed to meeting that case, and to go back and attempt to prove, and call it rebuttal by a witness, the observations that he made, and to track the same facts by direct testimony, and isn't in rebuttal at all, but part of the plaintiff's original case.

(The Court:) I overrule the objection.

Defendant excepts.

Q. What was that body, that lake in there, what was that body in there?

218 A. It was a cypress bottom, cypress knees, or something, a bottom.

Q. Now, between that cypress bottom and the Mississippi River, what if any land was there?

A. It was an island in there sir, a little island.

Q. How far was it across the cypress break?

A. To the river, Mississippi River.

Q. No, how wide was the cypress break in there at that time?

A. Two hundred yards, or more across the bottom.

Q. Do you know where Charlie McGhee, and aunt Ellen Jackson and all of those people live?

A. Yes sir.

Q. I am talking about that place is Section 11, T. 28, Range 5 West, you don't know that by sections?

A. No sir.

Q. But, you do know where those people live there?

A. Yes sir.

Q. Where was the cypress break with reference to where they live now, in front of the house or where?

A. I haven't been there seen it for ten years.

Q. Well, with reference to that land then, where was the cypress break?

A. To the left, passing down to the left.

Q. Now, when did that become a lake, that cypress break?

A. About '77, somewhere's along about that.

Q. Now, what caused it?

A. The levee broke down there and washed away, the levee broke, and all of the wash away made that cypress break.

Q. Went into that?

A. Yes sir.

Q. Did you ever go around this cypress break when steamboats were going around down through that bend?

A. Many a time.

Q. Could you or not see the steamboats across through there?

A. No sir couldn't see them.

219 Defendant objects and moves to exclude the answer.

Court sustains the objection.

Plaintiff excepts.

Q. Do you remember where Miller's wood yard was?

A. Yes sir.

Q. Did steamboats land there?

A. Yes sir, coming in there, had to go around the point and back a little and come into the wood yard.

Q. Where did they leave the wood there, where did they go?

A. Going above, they would come to the point.

Q. Suppose they were going south?

A. They didn't make any landing then in there, you remember, Doctor Vanguard, there was a tow in there, used to be called also Vanguard residence, he had a widow in there Doctor Vanguard.

Q. Taking from Miller's Point up in here on Section 7, when the boat landed there going this way, which direction did they go?

A. Went to the right going down.

Q. What was there between where the steamboats went and the Mississippi shore?

A. There was a little island in there.

Q. What made the island, if you know?

A. There was a gun boat sunk, a little fleet in there once, the Yankees and the men of '66 where you are speaking of.

Q. No, I am speaking of down in here front of Ellen Jackson and Charlie McGihee's, do you know what formed that island?

A. No sir, I don't, it was there when I came to the country.

Q. It was?

A. Yes sir.

Q. Now, when you came here, was the river running through there, or running in the channel that it is in now?

A. Running in the channel it is now when we came here in '49 this was Old River.

Q. Do you know anything of a plum orchard over in there?

220 A. Yes sir, I remember about the plum orchard.

Q. Now, with reference to that plum orchard, how close did the boats come to that plum orchard in going south, how far from it?

A. The Mississippi side here the plum orchard.

Q. No, do you remember a plum orchard on the Arkansas shore?

A. Yes sir.

Q. Now, this plum orchard on the Arkansas shore, how close did the boat channel come to it?

A. It was a bend there in the river.

Q. Yes I understand.

A. And I rode down on the boat several times, that you could see the plums on trees.

Q. Close enough to see the plums on the trees?

A. Yes sir, I seen plums on the trees, little woods and something like that, and trees were taller and could see the plums on trees.

Q. Did you know that land at that time where Pecan Lake, Old River, or Garner Lake, or whatever you call it, shown here as Pecan Lake, do you know where it is down on the river going south and west?

A. You mean Pecan Lake?

Q. Yes?

A. Yes sir.

Q. This, where you say this cypress break was washed out, where did it join back into the original stream, if you know?

A. The Fowler place, joined below the Fowler place.

Q. Do you know where Dustin Pond is now, what they call Dustin Pond?

A. I haven't been in there, it's been thirty years.

Q. Since you have been in there?

A. Yes sir, it has been thirty years.

Defendant renews the motion to exclude all of this evidence because it is original testimony.

Court overrules.

Defendant excepts.

221 Cross-examination:

Q. This plum orchard on the Arkansas shore, you mean before the cut off was made, you saw a plum orchard on the Arkansas shore?

A. Yes sir.

Q. You are not speaking of the plum orchard on the accretions south?

A. No sir, this plum orchard I am speaking of was thirty-eight or thirty-nine years old.

Q. There is some plum orchards on the main lands, south of the main land on the accretions?

A. South yes.

Q. All of these accretions coming down from the island up here, let me show you a larger map old man, now here's a larger map of the island itself and the cut off, there is the river as it is, the cut off, and here is the island, take the island and the accretions on that, the lands that we are squabbling over down here, all of this land was made, beginning about here, gradually coming down into there?

A. Inside of fifty years?

Q. Inside of fifty years.

A. Yes sir, inside of fifty years.

Plaintiff rests.

Defendant rests.

And this was all of the evidence introduced.

I, Y. E. Howell, Official Court Stenographer for the Eleventh Circuit Court District, State of Mississippi, do hereby certify that the foregoing pages contain a whole, true and correct transcript of my shorthand notes properly extended as the same were taken down by me on the trial of the case, styled in the caption of these notes, at the December, A. D. 1913 Term of the Circuit Court for the First District of Coahoma County, Mississippi.

Y. E. HOWELL.

222 Endorsed on said stenographer's notes is the filing thereof, which said filing is in words and figures as follows; to-wit: Filed this the 7th day of February, A. D. 1914.

J. E. MONTROY, *Clerk.*

223 *Notice to Stenographer.*

In the Circuit Court of the First District of Coahoma County, Mississippi.

ED JACKSON et al.

vs.

RUST LAND & LUMBER COMPANY.

To Y. E. Howell, Official Stenographer:

You are hereby notified that the defendant, the Rust Land & Lumber Company, in the above styled cause, has prayed an appeal of that case to the Supreme Court of the State of Mississippi from the judgment of the Circuit Court aforesaid, rendered therein against it and the copy of the stenographer's notes of the testimony introduced on the trial of the above case and of the proceedings of the said Court on the trial is desired by said defendant and you are requested to transcribe and file your said notes with the Clerk of said Court within the time required by statute so that the same will constitute a part of the record in said case on said appeal to the Supreme Court.

This the 11th day of December, 1913.

WILSON & ARMSTRONG,
MONTGOMERY & MONTGOMERY,
Attorneys for Defendant.

TUNICA, MISSISSIPPI, December 11th, 1913.

We certify that we have this day mailed to Y. E. Howell, Official Stenographer, the original of this notice.

MONTGOMERY & MONTGOMERY,
Attorneys for Defendant.

224 *Instructions Given by the Court for the Plaintiffs.*

ED JACKSON et al.

VS.

RUST LAND & LUMBER COMPANY.

The Court instructs the jury that they can in no event find that the lands from which the timber in controversy was cut are accretions to the Arkansas shore unless the defendant has satisfied them by a preponderance of the evidence that the said land lies north and east of what was the thread of the stream or channel of the Mississippi River at the time of the cut off in 1848, even though they believe from the evidence that the said tract of land is now connected with the Arkansas lands.

The Court instructs the jury that should they find from the evidence that the plaintiffs cut the timber in controversy in good faith by authority of King and Anderson, Charles McGhee, Ellen Anderson, who bona fide claimed the lands as accretions to sectional, T. 28, Range 5 West, in Coahoma County, Mississippi, and the defendant by force or intimidation took the timber away from them, then the plaintiffs have made out a prima facie case and it devolves upon the defendant to show, by a preponderance of the evidence that it is the owner of the land from which the timber was cut before defendant can recover in this case.

The court instructs the jury that unless the Rust Land Company has shown to the satisfaction of the jury, by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company in the State of Arkansas, or was north and east of a channel of the Mississippi River where the cut off 1848 occurred, then they will find for the plaintiffs.

225 The Court instructs the jury that in case they find for the plaintiffs, the form of their verdict shall be as follows, to-wit: We the jury find for the plaintiffs and assess the value of the property levied on at \$— (Filling in the blank with the amount of damages which they may find from the evidence to be the value of the property in controversy.

226 *Instructions Given by the Court for the Defendant.*

ED JACKSON et al.

VS.

RUST LAND & LUMBER COMPANY.

The Court instructs the jury for the defendant that if they believe from the evidence that — 1848 the Mississippi River made a cut off

on the Arkansas side, across Horseshoe Bend, leaving an island on the eastern or southern side of the river with the river between it and the Arkansas shore; that the island itself still continued to be and remain in the State of Arkansas, notwithstanding the cut off, and all land that formed to this island by accretions thereto, that is by the gradual and imperceptible formation behind the receding water became and was a part of the said island and still is; and if the jury believe from the evidence that the accretions forming from the island and attached thereto continually form to the south or southeast, around what is known as Dustin Pond, and between it and what is known as Pecan Lake or Old River, and that in this way was formed the land on which was grown the timber which was cut by the plaintiffs and is the subject of this litigation, then the jury will find for the defendant.

The Court instructs the jury for the defendant that it is the law that where the Mississippi River recedes slowly and imperceptibly from the land of a riparian owner and the land before covered with water is left dry such land belongs to the riparian owner from whose shores the water recedes, and if the jury believe from the evidence that the land on which was growing the timber in controversy in this suit, which was thus formed by the water receding from the direction of Horseshoe Island, and became thereby attached to the accretions theretofore formed and attached to the said island, then the jury are instructed that both the land and timber belong to the Rust Land & Lumber Company and the jury will find for the defendant.

227 The Court instructs the jury for the defendant that if they believe from the evidence that the body of water shown on the maps introduced in evidence in this case, and called Old River or Pecan Lake is between the Mississippi shore and the land on which the timber in controversy in this suit was growing, and that this body of water was the last channel of the river as it dried up between the island and the shore of Mississippi, and that the said lands on which the said timber was growing, is not attached to the Mississippi shore or any accretions formed or attached thereto, then the jury will find for the defendant.

The court instructs the jury for the defendant that even though they may believe from the evidence that the body of water mentioned in the maps and evidence in this case as Dustin Pond is a part of the old bed of the river, yet if they further believe from the evidence that the land south of it on which the timber was grown which is in controversy in this suit, is entirely separated from the Mississippi shore or any accretions thereto by a body of water approximately three hundred yards wide and very deep, to-wit: From eight to nineteen feet deep at its deepest, which body of water is known as Pecan Lake or Old River, having high banks on the Mississippi side and low sloping banks on the opposite side, and that the said land has never been attached to the Mississippi shore or any of the accretions thereto, but is a part of the accretions coming down from what is known as Horseshoe Island, then the jury are instructed that the said land is a part of the island and the

timber thereon was and is the property of the defendant and the jury will find for the defendant.

228 *Instructions Asked for by the Plaintiffs and Refused.*

ED JACKSON et al.

VS.

RUST LAND & LUMBER COMPANY.

By the Court:

The Court instructs the jury that if they believe from a preponderance of the evidence that King and Anderson, Charles McGhee, Ellen Jackson and Joe Williams had been in actual, open, notorious and adverse possession of the land from which the timber in controversy was cut for a continuous period of ten years or more, claiming the exclusive ownership thereof, then and in that event the jury will find for the plaintiffs.

Instructions Asked for by the Defendant and Refused.

ED JACKSON et al.

VS.

RUST LAND & LUMBER COMPANY.

By the Court:

The Court instructs the jury to find for the defendant.

The Court further instructs the jury for the defendant that in considering and determining the question as to whether or not the land from which the timber in controversy in this cause was cut the jury may consider and should consider, in connection with all of the facts and circumstances in this case, the following facts, if in proof, to-wit:

1. The opinions of the surveyors and civil engineers who have surveyed and examined the lands in question, and who are competent, to give such opinions with reference to the nature of the formation of the said lands.

2. The fact, if in proof, that a body of water three hundred yards wide divides it from the shore of Mississippi, or the original bank of the Mississippi River on the Mississippi side as it existed at the time of the cut off of 1848 as made by the river at Horseshoe Lake.

3. The fact, if the jury believe from the evidence that it is a fact, that this body of water is deeper on the Mississippi side than on the Arkansas side, that the deepest water extends from a short distance north of the old Mississippi shore about one-third of the

way across the lake or Old River, and from there north the remaining two-thirds of the way continues to grow more shallow until it reaches, at a very shallow depth, the sloping northern bank with very little bank to show.

4. The fact, if in proof, that the timber on the accretions between the said Horseshoe Island and the land where the timber was cut grows perceptibly smaller the further from the island towards the south that it is examined and that the timber is of later growth if the jury believe from the evidence that it is, on the land from which the timber in controversy was cut then it is on the land further north and northeast in the direction of the island.

5. The fact, if in proof, that the lands from which the timber in controversy in this suit was cut, is attached to and part of the accretions coming down from the island to it, and is at no point attached to or connected with the Mississippi shore or any accretion thereto; all these facts and circumstances, if the jury believe them to be true from the evidence, together with all other facts and circumstances in this case, the jury may consider in determining the question now before them, as to whether the lands from which the timber in controversy was cut is as an accretion a part of the lands of the defendant, and if from these facts and circumstances, and all of the other facts and circumstances in proof in this case the jury believe that the lands from which the timber in controversy in this suit was cut is a part of the accretions to the lands of the defendant, then the jury will find for the defendant.

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ED JACKSON et al.

vs.

RUST LAND & LUMBER COMPANY.

The court further instructs the jury for the defendant that the plaintiffs in this case can in no event recover in this case for the timber in controversy unless the proof shows by a preponderance of the evidence that the timber was cut growing on the lands belonging to the grantors of these plaintiffs, or some of them, and even though the jury should believe from the evidence that there were two bodies of water between Horseshoe Island and the Mississippi shore which should be properly denominated Old River, that is to say, Dustin Pond and Pecan Lake, and that the land on which the timber was growing was between those two, still the plaintiff could not recover in this case unless the evidence affirmatively shows by a clear preponderance thereof, that the said land is an accretion to the Mississippi shore, belonging to the grantors of this plaintiff.

231

Judgment of the Court.

#140.

ED JACKSON et al.

vs.

RUST LAND & LUMBER COMPANY.

This cause coming on this day to be heard and the plaintiffs and defendants both appearing in open court, when came a jury of good and lawful men of the regular venire for the week composed of Charles S. Palmore and eleven others, who having heard the evidence in the case and received the instructions of the court and heard the argument of counsel, retired to consider their verdict and returned into open court the following verdict in words and figures, to-wit: "We the jury find for the plaintiffs and assess the value of the property levied on at \$3,600.00, and it appearing to the court that the defendant, the Rust Land & Lumber Company, a corporation, organized under the laws of the State of Wisconsin, gave bond herein with the United States Fidelity and Guaranty Company, of Baltimore, Md., as sureties thereon and have taken possession of said property. It is therefore ordered and considered by the court that the defendant restore to the plaintiffs, Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isom White, the property levied on herein and in default thereof that said plaintiffs do have and recover of the defendant the Rust Land & Lumber Company and the United States Fidelity and Guaranty Company, of Baltimore, Md., the sureties on their bond the sum of Thirty Six Hundred Dollars (\$3,600.00) and all costs in this behalf expended for which execution may issue.

Ordered and considered this December 3d, 1913.

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Motion for a New Trial.

In Circuit Court, December Term, 1913.

STATE OF MISSISSIPPI,
Coahoma County:

ED JACKSON et al.

vs.

RUST LAND & LUMBER COMPANY.

Now comes the said defendant, by its attorney and moves the court to set aside the verdict of the jury and judgment of the court herein rendered against it at this term of the court and grant it a new trial herein and for causes of this motion says:

1. The Court erred in giving the first instruction for the plaintiff.
2. The Court erred in giving the second instruction for the plaintiff.
3. The court erred in giving the third instruction for the plaintiff.
4. The court erred in giving the fourth instruction for the plaintiff.
5. The court erred in giving the fifth instruction for the plaintiff.
6. The court erred in refusing the instruction asked for by the defendant, being instruction number one;
7. The Court erred in refusing instruction number six asked for by the defendant.
8. The court erred in refusing instruction number seven asked for by the defendant.
9. The verdict of the jury assessing the value of the logs in controversy in this cause is excessive according to the evidence;
10. The verdict of the jury is contrary to law.
11. The verdict of the jury is contrary to the evidence.
12. The verdict of the jury is contrary to the great preponderance of the evidence.

233 13. The court erred in permitting the plaintiff to introduce in rebuttal the witness, Miller, and in overruling the objection of the defendant to his testimony as not in rebuttal; and in overruling the motion of the defendant to exclude the said testimony on the ground that it was not in rebuttal; and because the witness could only be introduced on the direct examination of the plaintiff's witnesses in chief.

14. And for other causes to be assigned at the hearing.

Wherefore the defendant moves the court to set aside the verdict of the jury and the judgment of the court thereon, and to grant it a new trial herein.

MONTGOMERY & MONTGOMERY,
WILSON & ARMSTRONG,
Defendant's Attorneys.

Filed December 3d, 1913.

J. E. MONTROY, *Clerk,*
J. R. ALCORN, *D. C.*

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Order Overruling Motion.

#140.

ED JACKSON et al

vs.

RUST LAND & LUMBER COMPANY.

This day came the parties by attorney and came on for hearing the motion of the defendant to set aside the verdict of the jury and the judgment of the court herein rendered against it at the present

term of this court and the court having heard said motion, it is considered by the court that the same be and is hereby overruled and to this action by the court the defendant then and there excepted and is allowed sixty days in which to present a bill of exceptions as of this term, and the official stenographer is allowed 90 days within which to file a transcript of his notes in this cause herein.

235 STATE OF MISSISSIPPI,
County of Coahoma:

Know all men by these presents, that we, Rust Land & Lumber Company, principal, and United Casualty & Sureties Company, sureties, are held and firmly bound unto Ed Jackson et al. in the sum of Seventy Two Hundred Dollars (\$7,200.00) for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands and delivered this the — day of —
A. D. 1914.

The condition of this obligation is, That, whereas, a judgment was rendered by the Circuit Court of the County of Coahoma, in said State, on the — day of December, A. D. 1913 at the December Term A. D. 1913, thereof, in Case No. — in said Court, against Rust Land & Lumber Company in favor of Ed. Jackson et al. for Seventy Two Hundred (\$7,200.00) Dollars.

Now, if said Rust Land & Lumber Company principal obligor herein and appellant, will satisfy the said judgment, and such final judgment as may be made in said cause, and all costs, if the said judgment of said Circuit Court be affirmed by the Supreme Court of the State of Mississippi, to which Court an appeal from said judgment of said Circuit Court is to be prosecuted, then this obligation shall be void.

RUST LAND & LUMBER COMPANY,
By M. B. GOPER, *As't Sec'y & Treas.*
UNITED CASUALTY & SURETY CO.,
By J. J. GOODMAN, *Sec'y & Treas.*

Attest:

C. E. PARNELL,
Att'y in Fact.

The above bond is approved and filed this the 4th day of March
A. D. 1914.

J. E. MONTROY,
Circuit Clerk,
By J. R. ALCORN, *D. C.*

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Clerk's Certificate.

STATE OF MISSISSIPPI,
County of Coahoma:

I, J. E. Montroy, Circuit Court Clerk within and for the County of Coahoma, in said State, do hereby certify that the foregoing pages is a true and correct copy of all the proceedings had and done in the case, lately pending in said court, styled Ed. Jackson et al. vs. #140, Rust Land & Lumber Company, as the same now appears of record in my office at Friars Point, Mississippi.

Given under my hand and official seal on this the 8th day of April, 1914.

J. E. MONTROY, *Clerk.*
J. R. ALCORN, *D. C.*

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In the Supreme Court of Mississippi.

#17835.

RUST LAND & LUMBER Co., Appellant,

vs.

Ed JACKSON et al., Appellees.

Assignment of Errors.

Now comes Rust Land & Lumber Company, appellant, in the above numbered and entitled case, and assigns the following errors, which appellant avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein, as part of the record.

First Assignment of Error.

There is no evidence to support the verdict, and the verdict is contrary to the law (Transcript pp. 8-22).

Second Assignment of Error.

The verdict is contrary to the evidence (Transcript, pp. 8-22).

Third Assignment of Error.

The court erred in refusing to admit into evidence, and excluding the map offered on behalf of the defendant, which map is marked Exhibit No. 27 to the bill of exceptions (Transcript, pp. 168, 169).

Fourth Assignment of Error.

The Court erred in permitting the plaintiff to introduce in rebuttal the witness Harry Malone, and in overruling the objection of the defendant to his testimony as not in rebuttal, and in overruling the motion of the defendant to exclude the said testimony, on the ground that it was not in rebuttal, and because the witness could only be introduced on the direct examination of the plaintiff's witness in chief (Tr., pp. 214, 215, 216-221).

Fifth Assignment of Error.

The Court erred in instructing the jury as follows:

238 "The court instructs the jury that they can in no event find that the lands from which the timber in controversy was cut or accretions to the Arkansas shore unless the defendant has satisfied them by a preponderance of the evidence that the said land lies north and east of what was the thread of the stream or channel of the Mississippi River at the time of the cut off in 1848, even though they believe from the evidence that the said track of land is now connected with the Arkansas lands."
(Tr. pp. 224.)

Sixth Assignment of Error.

The Court erred in instructing the jury as follows:

"The Court instructs the jury that they should find from the evidence that the plaintiffs cut the timber in controversy in good faith by authority of King and Anderson, Charles McGhee, Ellen Jackson, who bona fide claimed the lands as accretions to Section 11, T. 28, Range 5 West, in Coahoma County, Mississippi, and the defendant by force or intimidation took the timber away from them, then the plaintiffs have made out a prima facie case and it devolves upon the defendant to show, by the preponderance of the evidence that it is the owner of the land from which the timber was cut before defendant can recover in this case."
(Tr. p. 224.)

Seventh Assignment of Error.

The Court erred in instructing the jury as follows:

"The court instructs the jury that unless the Rust Land Company has shown to the satisfaction of the jury, by a preponderance of the evidence that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company in the State of Arkansas, or was north and east of the channel of the Mississippi River where the cut off 1848 occurred, then they will find for the plaintiffs."
(Tr. p. 224.)

Eighth Assignment of Error.

The court erred in refusing the following special instruction requested by the defendant:

"The court instructs the jury to find for the defendant."
(Tr. p. 228.)

Ninth Assignment of Error.

The court erred in refusing the following special instruction requested by the defendant:

"The court further instructs the jury for the defendant that in considering and determining the question as to whether or not the land from which the timber in controversy in this cause was cut the jury may consider and should consider, in connection with all of the facts and circumstances in this case, the following facts, if in proof, to-wit:

1. The opinions of the surveyors and civil engineers who have surveyed and examined the lands in question, and who are competent, if the jury believe they are competent, to give such opinions with reference to the nature of the formation of the said lands.

2. The fact, if in proof, that a body of water three hundred yards wide divides it from the shore of Mississippi, or the original bank of the Mississippi River on the Mississippi side as it existed at the time of the cut off of 1848 as made by the river at Horseshoe Lake.

3. The fact, if the jury believe from the evidence that it is a fact, that this body of water is deeper on the Mississippi side than on the Arkansas side, that the deepest water extends from a short distance north of the old Mississippi shore about one-third of the way across the lake or Old River, and from there north the remaining two-thirds of the way continues to grow more shallow until it reaches, at a very shallow depth, the sloping northern bank with very little bank to show.

4. The fact, if in proof, that the timber on the accretions between the said Horseshoe Island and the land where the timber was cut grows perceptibly smaller the further from the island toward
240 the south that it is examined and that the timber is of later growth if the jury believe from the evidence that it is, on the land from which the timber in controversy was cut then it is on the land further north and northeast in the direction of the island.

5. The fact, if in proof, that the lands from which the timber in controversy in this suit was cut, is attached to and part of the accretions coming down from the island to it, and is at no point attached to or connected with the Mississippi shore or any accretions thereto; that these facts and circumstances, if the jury believe them to be true from the evidence, together with all other facts and circumstances in this case, the jury may consider it determining the question now before them, as to whether the lands from which the timber in controversy was cut is as an accretion a part of the lands of the defendant, and if from these facts and circumstances and all

of the other facts and circumstances in proof in this case the jury believe that the lands from which the timber in controversy in this suit was cut is a part of the accretions to the lands of the defendant, then the jury will find for the defendant.”
(Tr. P. 228.)

Tenth Assignment of Error.

The court erred in refusing the following special instruction requested by the defendant:

“The court further instructs the jury for the defendant that the plaintiffs in this case can in no event recover in this case for the timber in controversy unless the proof shows by a preponderance of the evidence that the timber was cut growing on the lands belonging to the grabtors of these plaintiffs, or some of them, and even though the jury should believe from the evidence that there were two bodies of water between Horseshoe Island and the Mississippi shore which should properly — denominated Old River, that is to say, Dustin Pond and Pecan Lake, and that the
241 & 242 land on which the timber was growing was between those two, still the plaintiff could not recover in this case unless the evidence affirmatively shows by a clear preponderance thereof, that the said land is an accretion to the Mississippi shore, belonging to the grantors of this plaintiff.”

Eleventh Assignment of Error.

The verdict is excessive. (Tr. pp. 74, 75, 231.)

Twelfth Assignment of Error.

The court erred in overruling appellant, Rust Land & Lumber Company's motion for a new trial, and especially in overruling those grounds of same which are identical with the foregoing assignments of error. (Tr. pp. 232, 233, 234.)

Wherefore, appellant, Rust Land & Lumber Company prays that the judgment of the Circuit Court of Coahoma County be reversed.

WILSON & ARMSTRONG,
MONTGOMERY & MONTGOMERY,
Att'ys for Appellant, Rust Land & Lumber Company.

We Wilson & Armstrong, Attorneys of Record for appellant, Rust Land & Lumber Company hereby certify that we have this day mailed, postage prepaid, to Maynard & Fitzgerald, Attorneys of Record for Appellees, Ed. Jackson et al., to their post-office address at Clarksdale, Mississippi, a copy of the foregoing assignment of errors.

March 24th, 1915.

WILSON & ARMSTRONG,
Att'ys for Appel-ant, Rust Land & Lumber Company.

Received and Filed March 25, 1915.

GEO. C. MYERS, *Clerk*,

By W. J. BROWN, *D. C.*

242½ Supreme Court of Mississippi, October Term, 1916, Saturday, December 23rd, 1916.

17835.

RUST LAND & LUMBER COMPANY

vs.

ED JACKSON et al.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Coahoma County, 1st District, and this Court having sufficiently examined and considered the same and being of opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the December term 1913, on the 3rd day of December, 1913, be and the same is hereby affirmed, and that appellees do have and recover of appellant and the United States Casualty Company, surety in the supersedeas bond the sum of thirty six hundred dollars, the amount of the judgment in the court below, together with the further sum of one hundred and eighty dollars, being damages at the rate of five per centum as allowed by law, as well as interest on the amount of said judgment from date of rendition till paid at the rate of six per centum per annum, and also the costs of this cause in this Court and in the court below to be taxed &c.

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In the Supreme Court of Mississippi.

RUST LAND & LUMBER COMPANY, Appellant,

vs.

ED JACKSON et al., Appellees.

Motion of Appellant for Rehearing and Written Opinion and Brief in Support of Same.

To the Honorables the Presiding Justice and the Associate Justices of Division B of the Supreme Court of Mississippi:

Now comes the appellant, Rust Land & Lumber Company and moves the court to grant a rehearing and file a written opinion in this cause, giving it- reasons for its decisions.

The grounds of this motion are as follows:

In this cause a judgment for Thirty Six Hundred Dollars against

appellant was on Saturday, December 23d, 1916, affirmed without any opinion.

Appellant has no knowledge or information of the reason of this action upon the part of the Court, except the statement of the public prints. The Commercial Appeal of December 26th, said:

"Another decision of some interest decided by Justice Potter was Rust Land & Lumber Company vs. Ed. Jackson et al. in the decision of this case was involved the question of boundary between riparian Mississippi and riparian Arkansas. Some timber had been cut on a tract of land which had been affected by one of the various escapades of the Mississippi River, and it was claimed had been formerly a part of Arkansas located near Friars point. The court had gone very carefully into the matter and had found that the best authenticated authorities upheld the contention of the appellants that the boundary is determined by the thread or bed of the stream and a study of the record here indicated that, regardless of the former location or jurisdiction, the present thread of the
244 Mississippi at the point in dispute put it squarely in Mississippi; that the finding of the lower court was correct and would stand affirmed."

A copy of the above report is hereto attached.

The failure of this Honorable Court to file, or write an opinion in this cause has inadvertently worked a great hardship upon this appellant for the following reasons:

First.

There are now pending between this appellant and various persons in addition to this cause, two other suits involving timber cut from lands situated in what was Horseshoe Bend, the same locus in quo involved in this suit, whether the decision of the Court in this case is decisive or affects either of those cases depends upon what this court decided in this case. It seems to this appellant a great hardship to compel it again to thread the thorny path of litigation in order to ascertain the views of this Court upon questions and squarely and unequivocally presented to it in this cause. To fail to state to appellant the reason why it has been turned away, when it had other cases which may be affected by this decision is, it seems, inconsistent with the principle that public policy demands an end of litigation.

Second.

The locus in quo in this case, Horseshoe Island, is a tract of approximately three or four thousand acres' worth, with the timber upon it, is worth Fifty Thousand Dollars. Yet questions involving this valuable property and vital to appellant are decided without any statement of what was decided, or why, the appellant after having submitted itself to the jurisdiction of the State Courts and litigated issues with a view of having determined what right it has to this property is left in the anomalous position of not having and not being able to ascertain even after it has litigated the question,

245 whether it has *any* right, and if so what, to this valuable property.

Third.

According to the statement of the public prints, the only source of information open to appellant, this Honorable Court decided that the present location of the thread of the Mississippi River controlled in determining the boundary between Arkansas and Mississippi, holding that "a study of the record here indicated that regardless of the former location, and jurisdiction, the present thread of the Mississippi at the point in dispute put it squarely in Mississippi" (Memphis Commercial Appeal, December 26th, 1916, quoted *supra*). Such a holding is to your appellant surprising. The change of the Mississippi River was concededly caused by an avulsion which occurred in 1848 and your appellant is advised that such an avulsion does not change the boundary lines between states and that, unless this Honorable Court so held, no Court has anywhere and at any time ever held otherwise, but that the rule that such an avulsion does not change the boundary is definitely settled by the Supreme Court of the United States, the only tribunal having jurisdiction authoritatively to pass upon such a question.

St. Louis vs. Rutz, 138 U. S. 226, 245;

Nebraska vs. Iowa, 143 U. S. 359;

Missouri vs. Nebraska, 196 U. S. 23;

Rees vs. McDaniel, 115 Mo. 145;

Rober vs. Michelson (Neb. 116, N. W. R. 949).

Fowler vs. Wood (Kan.) 85 Pac. 763, 6 L. R. A. N. S. 162;

Lynch vs. Allen (N. C.), 4 Dev. & Dat. 62;

Coulthard vs. McIntosh, 143 Ia. 389, 112 N. W. R. 233;

Missouri vs. Kansas (213 U. S. 78);

Vouvier vs. Stricklett, 40 Neb. 793;

State vs. Bowen, 149 Wis. 203, 39 L. R. A. N. S. 200;

Deloney vs. State, 88 Ark. 311;

Nix vs. Phifer, 73 Ark. 199;

Wallace vs. Driver, 61 Ark. 429;

Railway Co. vs. Ramsey, 53 Ark. 314;

Moss vs. Gibbs, 57 Tenn. (10 Heisk 283);

Cooley vs. Golden, 57 Mo. App. 229;

Angell on Water Courses (79th Ed.) Art. 57.

246 If this court did so hold, appellant desires to know the exact holding in order to present the question to the Supreme Court of the United States.

Fourth.

The real controversy involved in this cause is the bound-ry between Arkansas and Mississippi and to this controversy states of Arkansas and Mississippi are interested parties no less than are the appellant and appellees and are even now litigating the question in the Su-

preme Court of the United States. In view of this, your appellant is confident that this Honorable Court, a court constituted under the Constitution and Laws of the State of Mississippi, will seek with meticulous care to place appellant in that position which will best enable us to prevent its claims to the Supreme Court of the United States.

That in fixing a bound-ry line between two states, when the matter is sharply in issue between those states or between one of the states and a party claiming by virtue of his citizenship in another state and deriving title from such other state, a federal question arises and that the Supreme Court of the United States has exclusive jurisdiction for the settlement of that question seems to be plain.

In *Florida vs. Georgia*, 17 How., 478, it was said, on application of the Attorney General to be heard on behalf of the United States in the suit then pending between Florida and Georgia.

"In a case like the one now before us, there is no necessity for a judgment against the United States. For when the bound-ry in question shall be ascertained and determined by the judgment of the court, in the present suit, there is no possible mode by which that decision can be reviewed or reexamined at the instance of the United States. They will therefore be as effectually concluded by the judgment as if they were parties on the record, and a judgment entered against them."

And further:

"But under our Government, a bound-ry between two states
247 may become a judicial question to be decided in this court.

And, when it assumes that form, the assent or dissent of the United States can not influence the decision. The question is to be decided upon the evidence adduced to the court, and that decision, when pronounced, is conclusive upon the United States, as well as upon the states that are parties to the suit."

In other words, the Supreme Court of the United States is the only forum in which determinated question involved can be settled and a case of which the Supreme Court of the United States has exclusive jurisdiction so it is clearly a case which presents a Federal question.

It is therefore essential in order for appellant to present its case to the Supreme Court of the United States for it to know what was decided in order that it may ascertain to what extent the question of the bound-ry between the states was considered adjudicated. That this court will thus accord to it the opportunity to have its day in court, this appellant can not doubt.

The question of whether the Supreme Court of the United States has jurisdiction on writ of error to a State Supreme Court of a suit between individuals or a State and citizen of another state involving the bound-ry line between states is even now before the Supreme Court of the United States. This is a case of *W. A. Cissna vs. State of Tennessee* No. 89, October Term, 1916. This case grew out of centennial cut off an avulsion caused by the Mississippi River changing its course between Arkansas and Tennessee north of Memphis. The State

of Tennessee sued Cisna in a Tennessee Court for the value of timber cut on the lands affected by the avulsion and removed a judgment which was affirmed by the Supreme Court of Tennessee. Pending this litigation, the State of Arkansas filed a suit in the Supreme Court of the United States against the State of Tennessee in order to determine the bound-ry between the states at the same point.

After the decision of the Supreme Court of Tennessee, Cisna removed his case to the Supreme Court of the United States by a writ of error on the ground the bound-ry between the states was involved. On December 11th, 1916, the Supreme Court of the United States rendered an opinion in *Cisna vs. Tennessee* (the case of *Arkansas vs. Tennessee* being not ready for hearing) and said:

"At the threshold jurisdiction to review the judgment thus rendered is denied on the ground that no Federal question arises for decision.

"It is conceded in argument by both parties that the decision of the merits of this case will necessarily be the equivalent of a decision of a bound-ry suit pending on our original calendar between the two states that an affirmance of the money judgment below, will in substance, will be an award for virtually the entire avails of the land in suit in this case as well as of the greater part, if not all, of the lands to be affected in the bound-ry suit. Moreover, in substance it is not disputed that the facts here presented are identical with those upon which the solution of the bound-ry suit must depend. Under these conditions we think, without intimating an opinion on the question of jurisdiction raised in this case or on the merits, that we ought not to consider and pass upon this case without at the same time considering and passing upon the controversy concerning the bound-ry between the two states now pending on our docket. The identity of the two issues, the possible influence which the decision of the one would have on the rights pending in the other and the fact that the actor, State of Tennessee, in this suit is the defendant in the original suit, we think rendered that conclusion necessary.

"For these reasons we direct that this case be restored to the docket and that it be hereafter assigned for hearing at the same time and immediately after the coming on for hearing of the original bound-ry suit between the two states."

A copy of this opinion is attached to this motion.

It will thus be seen that the Supreme Court of the United States is of the opinion that even it should not decide a case involving the bound-ry line between two states before deciding the suit between the states about the same bound-ry.

Appellant is advised that the Justice to whom the record in this case was assigned is no longer a member of this Court. For that reason he could not now prepare an opinion in this case. Appellant therefore moves for a rehearing of the case so that it may be presented to the court as now constituted and the record be re-assigned to some member of the Court for the preparation of an opinion.

Respectfully submitted,

WILSON & ARMSTRONG,
Attorneys for Appellant.

We, Wilson & Armstrong, Attorneys for Appellant, hereby certify that we have this day mailed, postage prepaid, to Attorneys for Appellees, at their postoffice addresses, to Green & Green, Jackson, Miss., and Maynard & Fitzgerald, Clarksdale, Miss., copy of the above motion and brief in support of same.

Memphis, Tennessee, January 1st, 1917.

WILSON & ARMSTRONG,
*Attorneys for Appellant, Rust Land &
Lumber Company.*
WILSON & ARMSTRONG,

250 Supreme Court of the United States, October Term, 1916.

No. 89.

W. A. CISSNA, Plaintiff in Error,

vs.

THE STATE OF TENNESSEE.

In Error to the Supreme Court of the State of Tennessee.

DECEMBER 11, 1916.

Mr. Chief Justice WHITE delivered the opinion of the Court.

As owner and trust- for the people of the state of certain described lands, the state of Tennessee in a State Court commenced this action in 1903, against Cissna and others to recover and to restrain cutting timber thereon and for an accounting for timber already cut. A temporary injunction was granted against removing and cutting timber, which was modified by permitting, on the giving of a bond, the removal of timber already cut, and was subsequently again modified by allowing all the timber on the land to be cut and removed on the giving of additional bond. By pleas in abatement and answers the jurisdiction of the court was denied on the ground that the land was not in Tennessee, but in Arkansas and this was sustained and the suit dismissed for want of jurisdiction. The Supreme Court of the State, however, reversed this action and remanded the case for trial on the merits. 119 Tennessee, 47.

Pleadings were amended in the trial court and while the case was there undetermined the State of Arkansas filed in this Court its complaint against Tennessee to settle the boundary line between the two. The bill made reference to the suit pending in Tennessee and alleged that the land- embraced by that suit were in Arkansas subject to a sovereignty and denied the power of the State of Tennessee in its own courts to interfere with the lawful authority of the State of Arkansas. Thereafter the existence of the suit in this
251 court was alleged in the State Court and that court was asked to suspend proceedings until the decision in the bound-ry case. This was denied and a judgment was entered in favor of the

State of Tennessee, holding that the lands were in Tennessee and belonged to that State and this judgment was subsequently affirmed by the Supreme Court of the State. In that Court also the pendency of the original suit between the two states in this court was specially set up an application for suspension based on the fact was prayed but was refused. The judgment of the Supreme Court of the State not only decreed the lands to belong to the State of Tennessee in its sovereign capacity on the ground that they were situated in that State, but gave a recovery for the amount of timber cut before bringing of the suit and also for the money value of the balance of the timber on the land which had been cut and removed as the result of the modification of the injunction permitting that to be done.

At the threshold jurisdiction to review the judgment thus rendered is denied on the ground that no Federal question arises for decision.

It is conceded in argument by both parties that the decision of the merits of this case will necessarily be equivalent of a decision of the boundary suit pending on our original calendar between the two States and that an affirmance of the money judgment below will in substance be an award for virtually the entire avails of the land in suit in this case as well as of the greater part, if not all, of the lands to be affected in the boundary suit. Moreover, in substance it is not disputed that the facts here presented are identical with those upon which the solution of the boundary suit must depend. Under these conditions we think, without intimating an opinion on the question of jurisdiction raised in this case or on the merits that we ought not to consider and pass upon this case without at the same time considering and passing upon the controversy concerning the boundary between the two States, now pending on our docket.

252 The identity of the two issues, the possible influence which the decision of the one would have on the rights pending in the other and the fact that the actor, State of Tennessee, in this suit is the defendant in the original suit, we think renders that conclusion necessary.

For these reasons we direct that this case be restored to the docket and that it be hereafter assigned for hearing at the same time and immediately after the coming on for hearing of the original boundary suit between the two states and to that end that that hearing be expedited, we say in addition, first, that if the facts in the boundary case be stipulated by the parties either by reference to the facts shown in this case or otherwise, both the cases will be taken on submission on printed briefs if the parties are so advised, or second, if they are not so advised, upon an agreement and stipulation as to the facts in the boundary case, that case and this will be ordered advanced and assigned for oral argument at an early day.

And it is so ordered.

Chief Justice of the Supreme Court of the United States.

A true copy:

Test.

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17835.

RUST LAND & LUMBER CO.

VS.

ED JACKSON et al.

Comes Rust Land & Lumber Company, appellant, and moves the Court to continue this case and stay the trial thereof until a certain cause pending in the Supreme Court of the United States, No. 6 Original, on the docket thereof, styled State of Arkansas vs. State of Mississippi, is determined by that tribunal, and for cause of said motion shows as follows.

The issue in controversy in this case is the boundary lines between the State of Arkansas and the State of Mississippi, the appellees claiming under a grant from the State of Mississippi and the appellant claiming under a grant from the State of Arkansas. So that, the real question involved in this case, determinative of the rights of the parties, is the true boundary line between the said States at the place from which the timber involved in this suit was cut.

There is pending in the Supreme Court of the United States, and ready for the taking of testimony therein, said cause between the States of Arkansas and Mississippi, which involves only the true boundary line between said states at the very point in controversy in this suit, so that, a determination of the boundary line by the Supreme Court of the United States, which has the final jurisdiction thereof, will determine the boundary line between said States, and whether the land involved is in the said State of Arkansas, as claimed by appellant, or in the State of Mississippi, as claimed by appellees is the basis of contention in this case.

Motion sustained and cause continued.

254 Wherefore appellants move the Court to stay the trial of this action until the determination of said boundary at the very point in controversy in this case, until such determination by the Supreme Court of the United States has been made.

In support of said motion, appellants file herewith a copy of the original bill in the Supreme Court of the United States, and a copy of the motion for the appointment of a commissioner and a stipulation for the taking of proof therein.

WILSON & ARMSTRONG,
For Motion.

I, Julian C. Wilson, of counsel for appellant, do certify that I have mailed a copy of the above motion this day, postage prepaid, to Maynard & Fitzgerald, solicitors for appellees.

This March 4th 1916.

JULIAN C. WILSON.

Filed March 6th 1916.

GEO. C. MYERS, *Clerk.*

RUST LAND & LUMBER CO.

v.

ED JACKSON et al.

MONDAY, January 8th, 1917.

This cause coming on to be heard on the motion for rehearing and for written opinion, and this Court having sufficiently considered the same doth order and adjudge that said motion be and the same is hereby overruled.

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RUST LAND & LUMBER CO.

vs.

ED JACKSON et al.

Now comes the appellees herein and move the Court to set aside the continuance heretofore granted upon the 11th day of March 1916, on motion, no notice having been received of said motion by counsel for appellees before the same was sustained, because—

1. The decision of the Supreme Court of the United States will not be controlling in this case, as it may not be rendered, and will not be rendered, upon the same testimony produced in the same way, and the rights of the parties in this particular case are to be determined by the record as made and not by what may be developed at another time and under different circumstances.

2. There is no way known to the law by which said judgment in the Supreme Court of the United States can be in any way introduced into this Court which is only a Court of errors and appeals without any original jurisdiction, and its sole right in the premises is to affirm or reverse any decision made by the Circuit Court in accordance with whether or not said Circuit Court, upon the evidence before it, reached the correct conclusion.

3. Because this Court is not in any way subject to the final jurisdiction of the Supreme Court of the United States, but on the contrary, as to the question herein involved, that is to say, the rights of the parties to the timber growing in what was formerly the Mississippi river, the Supreme Court of the United States follows the decisions of the States and does not overrule them.

And for other grounds to be assigned at the hearing.

MAYNARD & FITZGERALD,
GREEN & GREEN,

Att'ys for Appellees.

We hereby certify that we have this day mailed Messrs. Wilson & Armstrong, Memphis, Tennessee, Bank of Commerce & Trust

Building and to Messrs. Montgomery & Montgomery, Tunica, Mississippi, a copy of the foregoing motion.

MAYNARD & FITZGERALD,
GREEN & GREEN,

Att'ys for Appellees.

Filed April 7th 1916.

GEO. C. MYERS, *Clerk.*

256 & 257 It is ordered by the Court that motion to set aside the continuance in this case be and the same is hereby sustained, and that the cause be placed on the docket for call the October term in its regular order.

Stipulation of Counsel.

It is agreed by and between the attorneys for the appellant and appellees in this cause as follows;

Whereas from the stipulation of counsel, which appears on page 7½ of the record in regard to forwarding original maps, there was inadvertently omitted from said stipulation the map introduced in evidence by the appellant in the circuit court of Coahoma County, same being exhibit "4", and bearing the following legends;

"Survey November 18, 22-1913, G. W. Calhoun, Surveyor, 2 South Main St. Memphis, Tenn."

It is therefore agreed by and between the parties to this suit that said map introduced in evidence of the above styled cause may be produced upon the hearing of same in the Supreme Court and that the original of same shall be received and accepted as part of the record in this case.

It further appearing that the map made by L. W. Mashburn has been inadvertently misplaced. It is stipulated and agreed that said L. W. Mashburn may supply said original map and same may be received as a part of the record upon the hearing of this case in the Supreme Court.

Witness our signatures this — day of September, 1916.

WILSON & ARMSTRONG,
Attorneys for Appellant

MAYNARD & FITZGERALD,
Attorneys for Appellees

Filed Oct. 7th, 1916.

GEO. C. MYERS, *Clerk.*

258 In the Supreme Court of the United States, October Term,
A. D. 1916.

RUST LAND & LUMBER COMPANY, Petitioner,

VS.

ED JACKSON, WILL SCOTT, J. F. NICHOLS, A. C. COLEMAN, ZANDERS
PARKER, and ISOM WHITE, Respondents.

*Petition for Writ of Error to the Supreme Court of the State of
Mississippi.*

To the Honorable Edward Douglass White, Chief Justice of the
United States, and to the Honorable James Clark McReynolds,
Associate Justice of the Supreme Court of the United States, and
to the Honorable Supreme Court of the United States:

The petition of the Rust Land & Lumber Company, a corporation
organized and existing under the laws of the State of Wisconsin,
respectfully shows:

1. Hereofore, and on or about the 15th day of March, 1913, an
action of replevin was commenced in the Circuit Court, First Dis-
trict, for the County of Coahoma, State of Mississippi, by Ed Jack-
son, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and
Isom White against your petitioner, Rust Land & Lumber Com-
pany, to recover certain timber, or the value thereof, alleged to have
been wrongfully taken by said defendant from the possession of the
said plaintiffs. To the declaration of the plaintiffs, the defend-
ant, Rust Land & Lumber Company, pleaded the general issue, and
upon the trial the cause was submitted to a jury under the instruc-
tions of the Court and the jury returned a verdict in favor of plain-
tiffs in the sum of \$3,600.00 and judgment was entered in said Cir-
cuit Court in accordance with the verdict of the jury.

2. The issue involved and submitted to a jury in said cause, under
the instructions of the Court, involved the question of the bound-ry
line between the State of Mississippi and the State of Arkansas, the
plaintiffs claiming that the land from which the timber in question
in this suit was cut was in the State of Mississippi and the
259 defendant claiming that said lands were in the State of
Arkansas. It was agreed by stipulations filed in said cause
that the defendant, Rust Land & Lumber Company, was the owner
of certain lands in the State of Arkansas immediately adjoining on
the north the land in question in said cause, and that the plaintiffs
were the owners of certain lands in the State of Mississippi imme-
diately adjoining on the south the land in question in said cause
and on which the timber in question was cut. Prior to the year
1848 the Mississippi River flowed at some point between the lands
now stipulated in said cause to be in the State of Mississippi and to
belong to the plaintiffs, and the land in Arkansas stipulated to belong
to the defendant. The plaintiffs claimed in the trial of said cause

that the lands in question were subsequently added by accretion to the Mississippi shore upon the gradual recession of the waters of the Mississippi River after the Mississippi River in 1848 changed its course and formed a new channel, and the defendants claimed that the lands in question were added by accretion to the Arkansas shore and now belong to it.

3. The defendant, Rust Land & Lumber Company, appealed from the judgment of said Circuit Court to the Supreme Court of Mississippi. While the case was pending in said Supreme Court, and on or about the 6th day of March, 1916, your petitioner, Rust Land & Lumber Company, appellant in said cause then pending in the Supreme Court of Mississippi, moved the Court to continue the cause and stave the trial thereof until a certain cause then pending in the Supreme Court of the United States, known as the State of Arkansas vs. State of Mississippi, number 6 original, on the docket of this Honorable Court was determined, and for cause of said motion showed as follows:

"The issue in controversy in this case is the bound-ry lines between the State of Arkansas and the State of Mississippi, the appellees claiming under a grant from the State of Mississippi and the appellant claiming under a grant from the State of Arkansas.

260 So that, the real question involved in this case, determinative of the rights of the parties, is the true bound-ry line between the said States at the place from which the timber involved in this suit was cut.

"There is pending in the Supreme Court of the United States, and ready for the taking of testimony therein, said cause between the States of Arkansas and Mississippi, which involves only the true bound-ry line between said states at the very point in controversy in this suit, so that, a determination of the bound-ry line by the Supreme Court of the United States, which has the final jurisdiction thereof, will determine the bound-ry line between said States, and whether the land involved is in the State of Arkansas, as claimed by appellees, is the basic contention in this case.

"Wherefore, appellants move the Court to stay the trial of this action until the determination of said bound-ry at the very point in controversy in this case, until such determination by the Supreme Court of the United States has been made.

"In support of said motion appellants file herewith a copy of the original bill in the Supreme Court of the United States, and a copy of the motion for the appointment of a commissioner and a stipulation for the taking of proof therein."

Said Court however refused to continue said cause until the case pending in this court was determined, but, on the contrary, proceeded with the hearing of said cause and on the 23d day of December, 1916, entered an order affirming the judgment of said Circuit Court, but without filing any opinion in said cause, and said judgment of said Supreme Court is a final judgment by the highest court in State of Mississippi in which a hearing could be had.

4. As appears from the motion of appellant, Rust Land & Lumber Company, for the continuance of said cause in the Supreme

Court of Mississippi, your petitioner showed that the question at issue in said cause was a Federal question, to-wit, the bound-ry
261 line between the States of Arkansas and Mississippi, and that this was the issue involved is further shown by the whole record in said cause and in particular by the instructions given by said Circuit Court to the jury under which the verdict of the jury was rendered, a copy of which instructions are attached as an exhibit hereto.

5. The claim of appellant, Rust Land & Lumber Company, which was thus presented and denied by the Supreme Court of Mississippi, was a claim that the lands in question in this cause are situated in the State of Arkansas and that the determination of the true bound-ry line between the States of Arkansas and Mississippi would necessarily establish the validity of this claim; that the determination of the bound-ry line was a Federal question arising under certain Acts of Congress admitting the States of Mississippi and Arkansas to the Union (Stat. at L. Vol. 3, Chap. 23, p. 348 and Vol. 5, Chap. 120, p. 50,) as appeared by the bill in the case pending in said Supreme Court of the United States which was filed in this cause in the Supreme Court of Mississippi; and the construction of these statutes of the United States and the determination of the bound-ry line between said two states was involved in said case of State of Arkansas vs. State of Mississippi so pending in this Honorable Court; but the title, right, privilege or immunity thus claimed by appellant under the statutes of, and an authority exercised under, the United States were denied by the judgment of the said Supreme Court of Mississippi, the highest court in said State in which a decision in said cause could be had.

6. Your petitioner, in support of this petition, respectfully calls the attention of this Honorable Court to the case of *Cisna vs. State of Tennessee*, reported in 242 U. S. 195, in which this Honorable Court continued on its docket a case then pending on error to the Supreme Court of the State of Tennessee, which involved the question of the bound-ry line between the State of Tennessee and the
262 State of Arkansas, on the ground that there was then pending in this Honorable Court another suit between the State of Arkansas and the State of Tennessee in which the same bound-ry question was involved.

A similar situation is presented in this cause. It is conceded that the lands involved in this cause, in which a writ of error to the Supreme Court of Mississippi is prayed by your petitioner, are the same lands that are involved in the suit pending in this Honorable Court and known as the *State of Arkansas vs. State of Mississippi*, and the decision of this latter case by this Honorable Court will determine the bound-ry line between the two States and the title of your petitioner to the land in question in this cause; and if the claim of your petitioner is sustained the decision of the Supreme Court of Mississippi in this cause should be reversed.

Your petitioner, by a petition for rehearing filed in the Supreme Court of Mississippi in this cause, called the attention of said Supreme Court to the decision of this Honorable Court in the case of

Cissna vs. State of Tennessee, supra, but the said Supreme Court of Mississippi nevertheless denied said petition for rehearing. Wherefore, your petitioner claims and says that by a final judgment in said cause in the highest Court in the State of Mississippi in which a decision in said cause could be had, there was a right, title, privilege or immunity which was specially set up and claimed by your petitioner, under and by virtue of the statutes of and authority exercised under the United States, and the decision of said court was against such right, title, privilege or immunity which was so specially set up and claimed by your petitioner; and wherefore, and in accordance with the statute in such case made and provided therefor, your petitioner prays that a writ of error may be issued and that it may be allowed to bring up for review before this Honorable Court the said order and judgment of said Supreme Court of Mississippi for the correction of the errors appearing therein, an assignment whereof is filed with this petition, and that a transcript of the record, 263 proceedings, files and papers in this cause, duly authenticated, may be sent to this Honorable Court.

And your petitioner prays for the allowance of a citation and supersedeas in due form of law, and that execution upon said judgment of the Supreme Court of the State of Mississippi and levy of such execution may be stayed until the further order of this Honorable Court; and that your petitioner may have such other and further relief in the premises as may be just, and your petitioner will ever pray, etc.

RUST LAND & LUMBER COMPANY,
Petitioner,

By STEPHEN A. FOSTER,
HARRY EUGENE KELLY,
Its Attorneys.

HERBERT POPE,
Of Counsel.

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EXHIBIT TO PETITION.

Instructions Given by the Court for the Plaintiffs.

ED JACKSON et al.
vs.
RUST LAND & LUMBER COMPANY.

The court instructs the jury that they can in no event find that the lands from which the timber in controversy was cut are accretions to the Arkansas shore unless the defendant has satisfied them by a preponderance of the evidence that the said land lies north and east of what was the thread of the stream or channel of the Mississippi River at the time of the cut off in 1848 even though they believe from the evidence that the said tract of land is now connected with the Arkansas lands.

The court instructs the jury that should they find from the evidence that the plaintiffs cut the timber in controversy in good faith by authority of King and Anderson, Charles McGhee, Ellen Jackson, who bona fide claimed the lands as accretions to Section 11, T. 28, Range 5 West, in Coahoma County, Mississippi, and the defendant by force or intimidation took the timber away from them, then the plaintiffs have made out a prima facie case and it devolves upon the defendant to show, by a preponderance of the evidence that it is the owner of the land from which the timber was cut before defendant can recover in this case.

The court instructs the jury that unless the Rust Land Company has shown to the satisfaction of the jury, by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company in the State of Arkansas, or was north and
265 east of the channel of the Mississippi river where the cut off 1848 occurred, then they will find for the plaintiffs.

The court instructs the jury that in case they find for the plaintiffs, the form of their verdict shall be as follows, to-wit: We the jury find for the plaintiffs and assess the value of the property levied on at \$— (Filling in the blank with the amount of damages which they may find from the evidence to be the value of the property in controversy).

Instruction Given by the Court for the Defendant.

ED JACKSON et al.

VS.

RUST LAND & LUMBER COMPANY.

The court instructs the jury for the defendant that if they believe from the evidence that 1848 the Mississippi River made a cut off on the Arkansas side, across Horseshoe Bend, leaving an island on the eastern or southern side of the river, with the river between it and the Arkansas shore that the island itself still continued to be and remain in the State of Arkansas, notwithstanding the cut off; and all land that formed to this island by accretions thereto, that is by the gradual and imperceptible formation behind the receding water became and was a part of the said island and still is; and if the jury believes from the evidence that the accretions forming from the island and still is; and if the jury believe from the evidence that the accretions forming from the island and attached thereto continually formed to the south or southeast, around what is known as Dustin Pond, and between it and what is known as Pecan Lake or Old River, and that in this way was formed the land on which
266 was growing the timber which was cut by the plaintiffs and is the subject of this litigation, then the jury will find for the defendant.

The court instructs the jury for the defendant that it is the law

that where the Mississippi recedes slowly and imperceptibly from the land of a riparian owner and the land before covered with water is left dry such land belongs to the riparian owner from whose shores the water recedes, and if the jury believe from the evidence that the land on which was growing the timber in controversy in this suit, which was thus formed by the water receding from the direction of Horseshoe Island, and became thereby attached to the accretions theretofore formed and attached to the said island, then the jury are instructed that both the land and timber belonging to the Rust Land & Lumber Company and the jury will find for the defendant. The court instructs the jury for the defendant that if they believe from the evidence that the body of water shown on the map introduced in evidence in this case, and called Old River or Pecan Lake is between the Mississippi shore and the land on which the timber in controversy in this suit was growing, and that this body of water was the last channel of the river as it dried up between the island and the shore of Mississippi, and that the said lands on which the said timber was growing, is not attached to the Mississippi shore or any accretions formed or attached thereto, then the jury will find for the defendant.

The court instructs the jury for the defendant that even though they may believe from the evidence that the body of water mentioned in the maps and evidenced in this case as Dustin Pond is a part of the old bed of the river, yet if they further believe from the evidence that the land south of it on which the timber was growing which is in controversy in this suit, is entirely separated from
267 the Mississippi shore or any accretions thereto by a body of water approximately three hundred yards wide and very deep, to-wit: from eight to nineteen feet at its deepest, which body of water is known as Pecan Lake or Old River having high banks on the Mississippi side and low sloping banks on the opposite side, and that the said land has never been attached to the Mississippi shore or any of the accretions thereto, but is a part of the accretions coming down from what is known as Horseshoe Island, then the jury are instructed that the said land is a part of the island and the timber thereon was and is the property of the defendant and the jury will find for the defendant.

268 In the Supreme Court of the United States, October Term,
A. D. 1916.

RUST LAND & LUMBER COMPANY, Plaintiff in Error,

vs.

ED JACKSON, WILL SCOTT, J. F. NICHOLS, A. C. COLEMAN, ZANDERS
PARKER, ISOM WHITE, Defendants in Error.

*Assignment of Errors in the Supreme Court of the United States
and Prayer for Reversal.*

And now comes the plaintiff in error in said cause and in connection with its petition for a writ of error shows that in the record and proceedings in said cause in the Supreme Court of Mississippi there is manifest error, and makes the following assignment of said errors which occurred in the hearing and decision of said cause in the Supreme Court of Mississippi, that is to say:

1.

The Supreme Court of Mississippi erred in affirming the judgment of the Circuit Court of Coahoma County.

II.

The Supreme Court of Mississippi erred in refusing to reverse the judgment of said Circuit Court of Coahoma County on the ground that the timber in question was cut from land situated in the State of Arkansas which belonged to plaintiff in error.

III.

The Supreme Court of Mississippi erred in denying the claim of plaintiff in error that the land in question in said cause was in the State of Arkansas and not in the State of Mississippi.

IV.

269 The Supreme Court of Mississippi erred in refusing to continue said cause as requested by plaintiff in error until this Honorable Court had decided the case of State of Arkansas vs. State of Mississippi, number 6 original, pending in this court, in which case is involved the question of the bound-ry line between the State of Arkansas and the State of Mississippi at the same point at which it is involved in this cause.

V.

The Supreme Court of Mississippi erred in affirming the judgment of said Circuit Court of Coahoma County in that an authority exer-

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cised under the United States was drawn in question in said suit and the decision of said court was against the validity of such authority.

VI.

The Supreme Court of Mississippi erred in refusing to recognize the authority of this Honorable Court to determine the question of the bound-ry line between the States of Arkansas and Mississippi then pending in this court in which case the bound-ry line between said States was drawn in question under certain Acts of Congress under which said States were admitted into the Union.

VII.

The Supreme Court of Mississippi erred in not holding that under the statute of the United States the land in question in this cause was in the State of Arkansas and belonged to plaintiff in error.

VIII.

The Supreme Court of Mississippi erred in denying the title, right, privilege or immunity specially set up and claimed by plaintiff in error under and in accordance with the true bound-ry line between the States of Arkansas and Mississippi as fixed and determined by the statutes and authority of the United States and so claimed by plaintiff in error to be a Federal question.

IX.

The Supreme Court of Mississippi erred in failing and refusing to hold that the judgment of said Circuit Court is contrary to the evidence in the record in said cause.

X.

The Supreme Court of Mississippi erred in failing and refusing to hold that said Circuit Court erred in denying the motion of the defendant made therein for a new trial of said cause.

Wherefore, the plaintiff in error prays that the judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court of Coahoma County may be reversed, annulled and in all things set aside, and that the plaintiff in error may be restored to all things which it has lost by the occasion of the said judgment.

STEPHEN A. FOSTER,
HARRY EUGENE KELLY,
Att'ys for Plaintiff in Error.

HERBERT POPE,
Of Counsel.

271 Know all Men by these Presents, That we, Rust Land and Lumber Company, as principal, and The Aetna Accident and Liability Company, of Hartford, Connecticut, as sureties, are held and firmly bound unto Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isam White in the full and just sum of Seven Thousand Five Hundred (\$7,500) dollars, to be paid to the said obligees, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of March, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a term of the Supreme Court of the State of Mississippi in a suit depending in said Court, between Rust Land and Lumber Company and Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isam White a judgment was rendered against the said Rust Land and Lumber Company and the said Rust Land and Lumber Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isam White citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Rust Land and Lumber Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

RUST LAND & LUMBER CO.,

By CHAS. A. M. SCHLIERHOLZ, *Attorney*. [SEAL.]

THE AETNA ACCIDENT AND LIABILITY
COMPANY,

By JUNIUS L. POWELL, *Attorney in Fact*. [SEAL.]

Sealed and delivered in presence of—

H. S. FROST.

J. B. MCGANAGHY.

Approved by—

J. C. McREYNOLDS,

*Associate Justice of the Supreme
Court of the United States.*

The Ætna Accident and Liability Company, Hartford, Connecticut.

Ætna.

Certificate of Authority of Attorneys-in-fact.

Know All Men by these Presents, That The Ætna Accident and Liability Company, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, hath made, constituted and appointed, and does by these presents make, constitute and appoint Junius L. Powell, of Washington, D. C., its true and lawful Attorneys, with full power and authority hereby conferred to sign, execute and acknowledge individually, any and all bonds, undertakings and other writings obligatory in the nature of a bond on behalf of the Company, and to bind The Ætna Accident and Liability Company thereby as fully and to the same extent as if such Bonds were signed by the duly authorized officers of The Ætna Accident and Liability Company, and all the acts of any one of said Attorneys, pursuant to the authority herein given, are hereby ratified and confirmed.

This power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of The Ætna Accident and Liability Company, at a meeting duly called and held on the 28th day of December, 1911, and as amended by the adoption of Section 5 at a meeting duly called and held on the 25th day of April, 1912.

Article 8. Resident Officers, Attorneys-in-Fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice Presidents, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 5. Attorneys-in-Fact may, subject to the provisions and limits named in their Certificate of Authority, execute and deliver and attach the seal of the Company to any and all bonds and undertakings and other writings obligatory in the nature of a bond on behalf of the Company, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon the Company as if signed by the President and sealed and attested by the Secretary.

In Witness Whereof, The Ætna Accident and Liability Company has caused these presents to be signed by its Secretary, and its cor-

porate seal to be hereto affixed, this 14th day of December, A. D. 1916.

[Seal The Ætna Accident and Liability Company, Hartford, Conn.]

THE ÆTNA ACCIDENT AND LIABILITY
COMPANY,

By D. N. GAGE, *Secretary*.

STATE OF CONNECTICUT,

County of Hartford, ss:

On this 14th day of December, A. D. 1916, before me personally came D. N. Gage to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is Secretary of The Ætna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal James F. McEvitt, Notary Public, State of Connecticut.]

JAMES F. McEVITT,
Notary Public.

My Commission Expires Jan. 31, 1918.

[Endorsed:] Received & filed Mar. 12, 1917. Geo. C. Myers,
Clerk.

272 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Rust Land & Lumber Company and Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker, and Isom White, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege or immunity was claimed under the Constitution, or any treaty or statute of, or com-

mission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under said Constitution, treaty, statute, commission, or authority, a manifest error hath happened to the great damage of the said Rust Land & Lumber Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventh day of March, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

Allowed by

J. C. McREYNOLDS,

*Associate Justice of the Supreme
Court of the United States.*

[Endorsed:] Supreme Court of the United States, October Term, 1916. Rust Land & Lumber Company, Plff in Error, vs. Ed Jackson et al. Writ of Error. Received & filed Mar. 12, 1917. Geo. C. Myers, Clerk.

273 STATE OF MISSISSIPPI,
Hinds County:

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are full, true and correct copies of the papers, each and all of them, constituting the record in the said Supreme Court of Mississippi in the case of Rust Land & Lumber Company vs. Ed Jackson et. al. No. 17835 on the docket of said Court; all of which are now on file in my office, and which, taken together, constitute the record in said Supreme Court of Mississippi.

Given under my hand and seal of said Supreme Court of Mississippi at Jackson, in the State of Mississippi, this the 3rd day of April, in the year of Our Lord one thousand nine hundred and

seventeen and in the one hundred and forty first year of the Independence of the United States of America.

[Seal State of Mississippi Supreme Court.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

STATE OF MISSISSIPPI,
Hinds County:

I, Geo. C. Myers Clerk of the Supreme Court of the State of Mississippi, do hereby certify that in obedience to the writ of error filed in the above cause I have this day forwarded to the Clerk of the Supreme Court of the United States at Washington District of Columbia, a full, true and correct transcript of all the proceedings in said cause in the Supreme Court of Mississippi together with all the proceedings had in said cause in the Circuit Court of Coahoma County, from which said cause was appealed.

Said transcript has been sent by express prepaid.

Given under my hand with the seal of said Court affixed at office in the City of Jackson, Mississippi, this the 3rd day of April, A. D. 1917.

[Seal State of Mississippi Supreme Court.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

274 In the Supreme Court of the State of Mississippi.

RUST LAND & LUMBER COMPANY

v.

ED. JACKSON et al.

In the preparation of the transcript in this cause, in addition to the matters hereinbefore ordered to be embodied in the record, the Clerk shall embody the motion made for a written opinion and other purposes in an order of the court thereon.

MAYNARD & FITZ GERALD.

275 In the Supreme Court of State of Mississippi.

RUST LAND & LUMBER COMPANY

v.

ED. JACKSON et al.

In the preparation of the transcript in this cause, in addition to the matters hereinbefore ordered to be embodied in the record, the Clerk shall embody the motion made for a written opinion and other purposes in an order of the court thereon.

HERBERT POPE,
Counsel for Rust Land & Lumber Co.

[Endorsed:] 17835. Rust Land & Lum. Co. v. Ed Jackson et al.
Præcipe. Filed M'ch 28/17. Geo. C. Myers, Clerk.

276 UNITED STATES OF AMERICA, ss.:

To Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker, and Isom White, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Mississippi, wherein Rust Land & Lumber Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. C. McReynolds, Associate Justice of the Supreme Court of the United States, this seventh day of March, in the year of our Lord one thousand nine hundred and seventeen.

J. C. McREYNOLDS,
*Associate Justice of the Supreme
Court of the United States.*

277 On this 13th day of March, in the year of our Lord one thousand nine hundred and seventeen, personally appeared J. C. Taylor before me, the subscriber, P. L. Waldrop, a Notary Public in and for the City of Clarksdale, Coahoma County, Mississippi, and makes oath that he delivered a true copy of the within citation to Ed Jackson, A. C. Coleman, Zanders Parker, and Isom White, and Maynard & Fitzgerald, Attorneys for Ed Jackson, Will Scott, J. F. Nichols, A. Coleman, Zanders Parker and Isom White. After diligence search and inquiry Will Scott and J. F. Nichols not found in Coahoma County, Mississippi.

J. C. TAYLOR,
Deputy Sheriff of Coahoma County, Miss.

Sworn to and subscribed the 13 day of March, A. D. 1917.

P. L. WALDROP,
Notary Public.

[Seal P. L. Waldrop, Notary Public, City of Clarksdale,
Coahoma County, State of Mississippi.]

278 In the Supreme Court of the United States, October Term,
1916.

RUST LAND & LUMBER COMPANY, Petitioner,

vs.

ED JACKSON, WILL SCOTT, J. F. NICHOLS, A. C. COLEMAN, ZANDERS
PARKER, and ISOM WHITE, Respondents.

*Receipt by the Clerk of the Supreme Court of the State of Mississippi
and Acknowledgment of Service of Writ or Error.*

I, George C. Myers, Clerk of the Supreme Court of the State of
Mississippi, acknowledge receipt of the following documents:

(1) Petition to the Chief Justice of the Supreme Court of the
United States and to the Honorable James Clark McReynolds, of
the Rust Land & Lumber Company vs. Ed Jackson, Will Scott, J. F.
Nichols, A. C. Coleman, Zanders Parker and Isom White, respond-
ents, for a writ of error, signed by Salem E. Foster and Harry
Eugene Kelly, attorneys for Plaintiffs in Error, and by Herbert
Pope, of counsel.

(2) Bond of the Rust Land & Lumber Company, with the Aetna
Accident & Liability Company of Hartford, Connecticut, as surety,
in the penalty of \$7,500.00, payable to the respondents to said peti-
tion as obligees, together with certificate of authority of Junius L.
Powell, Attorney in Fact, to sign bonds of this character.

(3) Writ of error directed to the Honorable Judges of the Su-
preme Court of the State of Mississippi, directing the records and
proceedings in said cause to be sent up to the Supreme Court of the
United States, and I hereby waive any further or other service of
said writ of error, acknowledging service thereof.

I will file all of said papers with the record in this Court.

[Seal State of Mississippi Supreme Court.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

This, March 12, 1917.

(Here follow maps marked pages 282 to 289, inclusive.)

Endorsed on cover: File No. 25,894. Mississippi Supreme Court. Term No. 471. Rust Land & Lumber Company, plaintiff in error, vs. Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isom White. Filed April 9th, 1917. File No. 25,894.

MAPS

TOO

LARGE

FOR

FILMING

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1918.

No. 171.

RUST LAND & LUMBER COMPANY, PLAINTIFF IN
ERROR,

vs.

ED JACKSON ET AL., DEFENDANTS IN ERROR.

**OPPOSITION TO MOTION TO CONSOLIDATE WITH
No. 7—ORIGINAL.**

Now come Ed Jackson and others, defendants in error, and respectfully resist the application for consolidation of this cause with the cause of State of Arkansas, complainant, vs. State of Mississippi, defendant, Number 7, Original, on the docket of this court for hearing, and for grounds in opposition thereto say:

I.

That this court is without jurisdiction of the cause No. 171, in this that—

(a) Certiorari is the sole remedy for reviewing the judgment of the Supreme Court of the State of Mississippi, under section 237, Judicial Code, as amended.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 471.

RUST LAND & LUMBER COMPANY,
Plaintiff in Error,

v.

ED JACKSON, Et Al,
Defendants in Error.

MOTION TO DISMISS OR AFFIRM.

Defendants in Error move the dismissal of the writ of error herein because—

1. Not properly sued out, in this: Plaintiff in Error obtained possession of the logs in controversy from the Sheriff of Coahoma County, Mississippi, by the execution of forthcoming bond with United States Fidelity and Casualty Company, as surety, conditioned to have the property forthcoming to abide the judgment of the Circuit Court of Coahoma County, which rendered judgment against plaintiff in error, that it forthwith restore the property or failing therein, that defendants in error do recover of the plaintiff in error and said United States Fidelity & Casualty Company thirty-six hundred dollars; said Casualty Company has not appealed to the Supreme Court of Mississippi, from said judgment of date December 3rd, 1913 (R. 164), and it has become final under the laws of Mississippi. Said Casualty Company was not before the Supreme Court of Mississippi, and before consideration may be had hereof said Casualty Company should have been brought seasonably before this Court, which has not been done.

2. That on its appeal bond from the Circuit Court of Coahoma County to the Supreme Court of the State

of Mississippi, said Rust Land & Lumber Company gave as surety, the United Casualty & Surety Company (Record, 166) against which final judgment was rendered by the Supreme Court of the State of Mississippi (Record page 171), and said surety thereon is not before this Court.

3. No Federal question is shown to be involved, in this: Under the statutes and decisions of Arkansas, the abutting owner upon navigable streams owns only to the ordinary high water mark and the bed of the stream is the property of Arkansas. The burden of proof herein being upon plaintiff in error, there is no showing of title by plaintiff in error to any portion of the bed of the Mississippi River, which has filled up after the avulsion of 1848; on the contrary, plaintiff in error shows title to only Sections 22 and 23, Township 4, Range 4 East, Phillips County, paying taxes upon only these parcels (R. 98 to 120 inclusive), which lands do not at any point reach the thread of the main channel of the Mississippi River.

4. No Federal question is shown to be involved in this: No opinion was rendered by the State Supreme Court herein, said Court expressly refusing to file a written opinion though required by statute to do so when its decision adjudicated any question of importance, and the plaintiff in error expressly stated the necessity therefor in order to make the presentation to this Court. (R. 174).

5. Said record fails to present any federal question properly raised at a proper time, the only attempt being in the petition for a re-hearing, which was too late for the presentation and reservation of such federal question.

6. Said record containing no evidence to show where said line was between the states of Mississippi and Arkansas in 1848, the said Supreme Court was with-

out power to reverse said decision of the Circuit Court, and if said decision is to be reversed it can be done only upon a writ of error directed to said Circuit Court of Coahoma County, not to the Supreme Court of the State of Mississippi, whose jurisdiction is conditioned upon the error appearing in the record, and whose jurisdiction is limited strictly to that of a court of appeals.

But should it be held by this Court that a federal question was presented sufficient to sustain the writ of error, then the judgment of the Supreme Court of the State of Mississippi should be affirmed on this motion, because—

(1) There are ample grounds shown by the record independent of such federal question upon which said Supreme Court could and did place its decision, embracing—

(a) The fact that plaintiff in error did not have title to the state boundary line.

(b) That possession of defendants in error gave them title as against all parties save the state of Arkansas.

(c) That plaintiff in error was without right as an individual as against defendants in error as individuals, irrespective of the sovereignty of the states in the premises.

2. Because both the states of Arkansas and Mississippi have fixed upon the same thread of the stream as a dividing line and this will be conclusive.

3. That in this record seeking to reverse the judgment of the Circuit Court of Coahoma County, there is no proof whatever as to where the said line was in 1848 at the time of the avulsion, and the burden of proof being upon the plaintiff in error, judgment final should have been directed for the defendant in error for want of sustaining proof.

4. The evidence shows that the correct line puts all

of the land on which this timber was cut within the state of Mississippi, wholly irrespective of any federal question.

5. The Supreme Court of the State of Mississippi was without authority to reverse the judgment of the Circuit Court of Coahoma County, Mississippi, unless it affirmatively appeared that there was error in said record.

Wherefore, should jurisdiction be maintained, defendants in error move for an affirmance under the rule.

GEORGE F. MAYNARD,
 GERALD FITZGERALD,
 Clarksdale, Miss.;
 MARCELLUS GREEN,
 GARNER WYNN GREEN,
 Jackson, Miss.,
Attorneys for Defendants in Error.

CERTIFICATE OF SERVICE.

I do hereby certify that I sent by mail by registered letter to Mr. Herbert Pope, Attorney for Plaintiff in Error, Monadnock Block, Chicago, Ill., on the..... day of April, 1918, a copy of this motion, together with a copy of the Brief for Defendants in Error in support thereof, this the..... day of April, 1918.

GARNER W. GREEN,
Of Attorneys for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

RUST LAND & LUMBER COMPANY,
Plaintiff in Error,

v.

ED JACKSON, Et Al,
Defendants in Error.

BRIEF UPON MOTION TO DISMISS OR AFFIRM.

Defendants in error herein file a motion to dismiss
or affirm and rely upon—

POINTS.

I.

WRIT OF ERROR NOT PROPERLY SUED OUT
IN THIS: IT FAILS TO BRING PROPERLY BE-
FORE THIS COURT ALL PERSONS NECESSARY.

(1) THE SURETY UPON THE FORTHCOM-
ING BOND AGAINST WHOM JUDGMENT WAS
RENDERED BY THE CIRCUIT COURT OF
COAHOMA COUNTY, AND

(2) THE SURETY UPON THE APPEAL BOND

FROM THE CIRCUIT COURT OF COAHOMA
COUNTY TO THE STATE SUPREME COURT.

Mason v. United States, 136 U. S. 581; *Hardee v. Wilson*, 146 U. S. 181; *Haight v. Robinson*, 203 U. S. 581; *Fiebleman v. Packard*, 108 U. S. 14; *Simpson v. Greeley*, 20 Wall. 162; *Masterton v. Herndon*, 10 Wall. 416; *Williams v. Bank*, 11 Wheat. 414; *Moon v. Simonds*, 100 U. S. 145; *Smith v. Strader*, 12 How. 327; *Estes v. Traube*, 128 U. S. 230; *Owens v. Kincannon*, 7 Pet. 399; *Wilson v. Insurance Co.*, 12 Pet. 140; *Todd v. Daniels*, 16 Pet. 521; *Davenport v. Fletcher*, 16 How. 142; *Mussina v. Cavazos*, 20 How. 280.

II.

UNDER THE STATUTES AND DECISIONS OF ARKANSAS, THE ABUTTING OWNER UPON NAVIGABLE STREAMS OWNS ONLY TO THE ORDINARY HIGH WATER MARK AND THE BED OF THE STREAM IS THE PROPERTY OF THE STATE, AND IN THE CASE AT BAR PLAINTIFF IN ERROR FAILED TO SHOW TITLE TO ANY LAND BELOW SAID HIGH WATER MARK OR TOUCHING THE BOUNDARY OF MISSISSIPPI AT ANY POINT.

Arkansas v. Tennessee, Original No. 4, Docket 1917; *Johnson v. Quarles*, 182 S. W. 283; *Kinnanne v. State*, 106 Ark. 283; *Railroad Co. v. Ramsey*, 8 L. R. A. 557; *Borough v. Boyle*, 108 S. W. 379; *Polack v. Stankey*, 100 Ark. 36; *Sand Co. v. Attorney General*, 180 S. W. 219; *Session Laws, Arkansas 1892*, 207. *Cisna v. Tenn.* No. 20; Oct. 19, 1917; decided Mar. 11, 1918.

III.

THE SUPREME COURT OF MISSISSIPPI GAVE NO WRITTEN OPINION, EXPRESSLY OVERRULING A MOTION WHEREUNDER A FEDERAL QUESTION WAS SOUGHT TO BE MADE.

THERE ARE AMPLE NON-FEDERAL GROUNDS WHEREUPON SAID JUDGMENT MAY BE SUPPORTED.

Power Co. v. Railroad Co., 244 U. S. 303; (Cases there reviewed) *Allen v. Arguinbau*, 198 U. S. 155; *Dible v. Bellingham Bay Land Company*, 163 U. S. 63; *Klinger v. Missouri*, 13 Wall. 257.

IV.

ONLY ATTEMPT TO RAISE FEDERAL QUESTION WAS UPON MOTION FOR WRITTEN OPINION AFTER DECISION MADE, WHICH WAS TOO LATE.

Meyer v. Richmond, 172 U. S. 92; *Turner v. Richardson*, 180 U. S. 92.

V.

SUPREME COURT OF MISSISSIPPI ONLY A COURT OF APPEALS, WITHOUT ORIGINAL JURISDICTION, AND IF THE DECISION HERE ASSAILED IS TO BE REVERSED, IT MUST BE BY WRIT OF ERROR TO THE CIRCUIT COURT OF COAHOMA COUNTY.

Should the Court take jurisdiction, we then insist that the judgment should be affirmed, because

VI.

AMPLE NON FEDERAL GROUNDS EXIST WHEREUPON THE JUDGMENT MAY BE SUPPORTED.

STATEMENT OF THE CASE.

This writ of error is to the Supreme Court of the State of Mississippi, seeking to reverse a judgment there which, without opinion, affirmed a judgment in favor of defendant in error, rendered by the Circuit Court of Coahoma County.

Defendants in error were ignorant negroes who in

good faith purchased certain timber located upon about 30 acres of ground—the situs whereof will be seen upon the map annexed to the record. They had cut these trees down, and worked upon them, and were at their homes in Mississippi when a representative of plaintiff in error got a “High Sheriff” of Arkansas, crossed the Mississippi line and served notice that if they did not at once give up this timber that they would, without more ado be carried off to jail. As one of them expresses it: “I just give down, had to give down,” (R. 20), whereupon the defendants in error “pleaded to lawyer Fitzgerald for relief” (R. 20) with the result that upon his advice the raft was completed and levied upon under a writ of replevin. Thereupon the plaintiff in error gave bond for the property with the United States Fidelity & Guaranty Company as surety, and upon a trial of some length, the jury found for the negroes and the judgment was affirmed.

ARGUMENT.

I.

All parties must be brought before this court.

Plaintiff in error, in the petition for a writ of error (Transcript 181), and in the writ of error (Transcript 191) fails to make parties—

(a) The United States Fidelity & Guaranty Company of Baltimore, Maryland, the surety upon the forthcoming bond (Transcript 3), said judgment, reciting:

“It is, therefore, ordered and considered * * * that the defendant restore to the plaintiff * * * the property levied on herein, and in default thereof that said plaintiffs do have and recover of the defendant, the Rust Land & Lumber Company, the United States Fidelity & Guaranty Company of Baltimore, Maryland, the sureties on their bond the sum of thirty-six hundred dollars (\$3,600.00), and all costs in this behalf expended.”

(b) The United Casualty & Surety Company;

(Transcript 166) the judgment in the Supreme Court of Mississippi reciting:

“And that appellees do have and recover of appellant and the United States Casualty Company (should be United Casualty & Surety Company) surety in the supersedeas bond, the sum of thirty-six hundred dollars (\$3,600.00).”

In *Mason v. United States*, 136 U. S. 581, 34 Law. Ed., 545, the syllabus correctly states the decision thus:

“Where a judgment is joint, against several, and the interests of all are affected by the judgment, all must join in the writ of error, or it will be dismissed unless there has been a summons and severance.

“(2) Where the writ of error was sued out by a part only of joint defendants against whom a joint judgment was rendered, this court will not permit it to be amended here by inserting names of the other defendants as plaintiffs in error, nor a judgment of severance on their consent.”

Hardee v. Wilson, 146 U. S. 181; approved in *Haight v. Robinson*, 203 U. S. 581.

See also: *Feibleman v. Packard*, 108 U. S. 14; *Simpson v. Greeley*, 20 Wall. 162; *Masterton v. Herndon*, 10 Wall. 416; *Williams v. Bank*, 11 Wheat. 414.

See as to an appeal:

Moon v. Simonds, 100 U. S. 145; *Smith v. Strader*, 12 How. 327.

In *Estes v. Traube*, 128 U. S. 230, the court said:

“It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by not less than the whole number of the defendants against whom the judgment is entered.

Williams v. Bank of United States, 24 U. S. 11, Wheat. 414; *Owings v. Kincannon*, 32 U. S., 7 Pet. 399; *Wilson v. Life & Fire Ins. Co., of New York*, 37 U. S., 12 Pet. 140; *Todd v. Daniel*, 41 U. S., 16 Pet. 521; *Davenport v. Fletcher*, 57 U. S., 16 How. 142; *Mussina v. Cavazos*, 61 U. S., 20 How. 280, 289; *Sheldon v. Clifton*, 64 U. S., 23 How. 481, 484; *Hampton v. Rouse*, 13 Wall. 187.

These decisions render it absolutely certain, therefore, that the writ of error herein sued out by the Rust Land & Lumber Company, which is not in any way participated in by the surety on the appeal bond in the supreme court and which is in no way participated in by the surety in the circuit court of Coahoma county, does not effectually transfer appellate jurisdiction to this court to consider this cause.

Therefore, under these decisions, there having been no summons and severance, and no participation by either (a) said United Casualty and Surety Company; or (b) the United States Fidelity & Guaranty Company, of necessity, this writ of error must be dismissed.

Section 1005 of the Revised Statutes does not reach. *Mason v. U. S.*, *supra*; *Estes v. Traube*, *supra*; *Hardee v. Wilson*, *supra*.

The contention that a surety is not an essential party is settled by numerous of the foregoing decisions.

Under the Mississippi decisions the same doctrine is applicable. In *Thomas v. Wyatt*, 17 Miss. 309, that court says:

"The action was replevin, brought by Thomas against Wyatt. The verdict was for the defendant, and the court rendered judgment as the statute requires, against the plaintiff and his sureties in the bond for the amount of the verdict. There were two sureties, but Thomas alone sues out the writ of error, which writ recites a judgment against Thomas in favor of Wyatt. The record returned shows a judg-

ment against Thomas and Lansdale and Bryan as sureties. It is immaterial in what character Lansdale and Bryan became parties to the judgment. It is against the three parties as a joint judgment, and of course they should be joined in the writ of error."

See *Whitworth v. Carter*, 41 Miss. 640, wherein a review of the Mississippi decisions is had.

See also: *Green v. Bank*, 3 How. (Miss.) 43; *Duvall v. Cox*, 5 How. (Miss.) 12; *Barker v. Wanzer*, 5 How. 290; *Flournoy v. Burke*, 4 How. 337; *Henderson v. Wilson*, 4 S. & M. 732; *Preira v. Silver*, 4 S. & M. 735; *Hoggatt v. Ferrell*, 41 Miss. 643; *Sellers v. Smith*, 39 So. 356.

II.

NO FEDERAL QUESTION IS SHOWN TO BE INVOLVED IN THIS SUIT—

(a) Defendants in error, in good faith, under contract of purchase, cut the timber, and thereupon plaintiff in error, by force, wrongfully deprived them of the possession.

"In what way did they take it from you, by force or not?" A. "By force. We wasn't willing to give it up; came there with a high sheriff from Phillips county; we were satisfied we were right, but when the high sheriff come, couldn't help it."

It appears, furthermore, that this "high sheriff" from Phillips county at this time was within the State of Mississippi and exercised wrongfully his pretended authority against these ignorant negroes, so that the circuit court very properly gave an instruction devolving upon plaintiff in error the proving of a title, to justify it if could, its wrongful forcible deprivation of the ignorant colored men. (Record, 160).

Now, under the laws of Arkansas, the ownership of plaintiff in error extends only to high water mark. The bed of the stream is public property, whereof the state is trustee.

Johnson v. Quarles, 182 S. W. 283;

8
Cinna v. Lenn, supra.

Kinnanne v. State, 106 Ark. 283.

Arkansas v. Tennessee, Original No. 4.

Plaintiff in error, under the agreement, Record, page 7, has his title admitted "to Sections 22 and 23," Township 4, Range 4 East, Phillips County, which in the plat annexed to the record is shown to contain, Section 22, 56.53 acres; Section 23, 12.07 acres, making a total of 68.60 acres.

Plaintiff in error is shown to have paid taxes on Section 22, containing 56.53 acres on a basis of \$55.00, and on Section 23, containing 12.33, on a basis of \$15.00 in 1895 (Record, page 98), and to have paid taxes in 1896, upon the same land upon a basis of \$70.00 valuation; and in 1897, upon a basis of \$70.00 valuation; in 1898, upon the same valuation, and we call attention to a misprint in the record (Record 102), wherein the original state record shows 56.33 while the record here purports to show 656.53, which is an error and should be corrected.

In 1898 the same taxes were paid upon the same acreage; in 1899, the same acreage was paid on, but the valuation was raised to \$135.00, which valuation continued to be paid on in 1903, and in 1904 the valuations were increased to \$275.00, which valuation continued in 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, Record 98 to 120 inclusive.

Now, payment of taxes is a strong evidence of a claim of title, and a failure to pay is evidence of a want of any right or claim to the property.

Haltzman v. Douglass, 42 L. Ed. 466, quoted in *McCaughan v. Young*, 85 Miss. 293.

With this burden upon the appellant, its right of property terminated at the high water mark, under the decisions of the Arkansas court, which are conclusive upon this question.

Arkansas v. Tennessee, Original No. 4; *Archer v. Gale*, 233 U. S. 68; *Packer v. Byrd*, 137 U. S. 661; *St.*

Louis v. Reetz, 138 U. S. 242; *Kauna v. Canal*, 142 U. S. 271; *Shiveley v. Bowlby*, 152 U. S. 44; *Hardin v. Jordan*, 140 U. S. 371; *Transportation Co. v. Mobile*, 187 U. S. 482.

Cisna v. Tenn. supra.

As to the Arkansas law, see:

Arkansas v. Tennessee, supra; *R. R. Co. v. Ramsey*, 8 L. R. A. 557; *Borough v. Boyle*, 108 S. W. 379; *Polack v. Stankey*, 100 Ark. 36; *Johnson v. Quarles*, 182 S. W. 283; *Southern Sand Co. v. Attorney General*, 180 S. W. 219; *Session Laws Arkansas 1892*, page 207. *Cisna v. Tenn. supra.*

The statement made in the petition for the writ of error that this case involved the boundary line between the State of Mississippi and the State of Arkansas, is erroneous. The right of plaintiff in error terminated at the high water mark on the Arkansas shore in 1848, and did not reach to the thread of the stream, which was the boundary between Arkansas and Mississippi at that date, and which, by reason of there having been at that date an avulsion, has remained fixed from that time to this.

Arkansas v. Tennessee, supra; *Nebraska v. Iowa*, 143 U. S. 361; *Shiveley v. Bowlby*, 152 U. S. 1; *Missouri v. Nebraska*, 196 U. S. 23; *New Orleans v. United States*, 10 Peters 662; *Missouri v. Kentucky*, 11 Wall., 395; *St. Clair County v. Lovington*, 23 L. R. A. 63; *Stackley v. Cissna*, 119 Tenn. 152; 119 Fed. 812; *Hearn v. State*, 181 S. W. (Ark.) 295, approving *Tennessee v. Pulp Co., supra*; *Tennessee v. Pulp Co.*, 119 Tenn. 56; approved in *Kinnanne v. State*, 106 Ark., distinguishing *Butterworth v. Bridge Co.*, and *Iowa v. Illinois*, 147 U. S. 1. *Cisna v. Tenn. supra.*

Reliance was placed before the supreme court, upon the decision of this court in *Cisna v. Tennessee*, 242 U. S. 243, but there the question between plaintiff and defendant was as to the line between the states, not a question where the plaintiff in error's title stopped at high water mark, and did not come, therefore, in conflict with the title of the defendant in error which ex-

tends, under the laws of the State of Mississippi, to the thread of the stream.

Morgan v. Reeling, 3 S. & M. 397 (leading case) *Commissioners v. Withers*, 29 Miss. 33; *Magnolia v. Marshall*, 39 Miss. 109; *R. R. Co. v. Frederick*, 26 Miss. 9; *Boone v. Dixon*, 77 Miss. 592; *Archer v. Greenville*, 233 U. S. 68.

In the motion for a re-hearing, in the supreme court of Mississippi, plaintiff in error pressed the court for a written opinion on this very ground. The statute of the State of Mississippi requires the supreme court to render a written opinion, code 1906, section 4918.

"4918 (4352) *What opinions be in writing.*—In all cases settling important principles, in cases to be remanded, and in all cases where the judgment or decree of the court below is reversed, the opinion of the supreme court shall be in writing stating the reasons upon which the decision is made; and the opinion shall be recorded by the clerk in a well-bound book to be kept for that purpose."

So that, this case was decided by Mr. Justice Potter, who did not think it decided any important principle, and later decided by Justice Stevens, who did not think it decided any important principle; and let it be noted that this writ of error was not obtained from the Mississippi supreme court, but was obtained from the justices of this court upon the statement made in the petition for writ of error, that

"It is conceded that the lands involved in this cause, in which a writ of error to the supreme court of Mississippi is prayed by your petitioner, are the same lands that are involved in the suit pending in this honorable court, known as the *State of Arkansas v. State of Mississippi*, and the decision of this latter case by this honorable court will determine the boundary line between the two states and the title of your

petitioner to the land in question in this cause; and if the claim of your petitioner is sustained, the decision of the supreme court of Mississippi in this cause should be reversed (Record 183). Italics ours.

With deference we submit that there is no such concession. A decision of the case of *Arkansas v. Mississippi* will establish a line that is distant at least half a mile (the Mississippi is about a mile wide at this point) from the line that is in controversy in the present case, so far as any record has been introduced showing title in plaintiff in error.

That the supreme court of Mississippi did not consider the boundary line is absolutely demonstrable from its action in overruling the plaintiff in error's petition for a written opinion (See, especially, Record, page 174). There the plaintiff in error set up the necessity of a written opinion if this point was to be decided, and in said petition set forth:

"It is, therefore, essential, in order for appellant to present its case to the supreme court of the United States, for it to know what was decided in order that it may ascertain to what extent the question of the boundary between the states was considered adjudicated. That this court will thus accord it the opportunity to have its day in court, this appellant cannot doubt."

Hence, when, under section 4918, no written opinion was rendered, it was self-evident that the reason therefor was that the supreme court of Mississippi accepted the contention of the appellee, defendant in error here, that the boundary line between the two states was not involved.

This is further made manifest by the fact that plaintiff in error made a motion to continue this cause (Record 178) upon this ground, which being uncontested was sustained, there having been, as recited in the motion to set aside the continuance (Record 179), no notice re-

ceived of said motion by counsel for appellee, (it being the practice of the Mississippi court in matters of this character to grant such motions as of course when not contested).

But there then came on a motion to set aside the continuance (Record 179), the principal predicate of which is contained in the third ground, showing there was no federal question involved, and the continuance was thereupon set aside and the cause remanded to the docket, and affirmed without an opinion.

The effect of such affirmance is well stated in *Power Co. v. Realty Co.*, 244 U. S. 303, where this court said:

“It is contended that, ‘Conceding the existence of federal questions in the case, nevertheless as there were independent state grounds broad enough to sustain the judgment, there is no jurisdiction.’ We think the contention is sound.”

Here the supreme court of Mississippi declined to write an opinion because it held that no important question was decided, and, therefore, its holding is conclusive upon this court.

Again, as said in the same case:

“But assuming that we are not controlled by the statement of the supreme court of Ohio on this subject, and must determine it upon our own conception as to what was done by the court whose judgment is under review, the result would be the same. We so conclude because, looked at from the point of view of the action of the trial court and of the court of appeals, the case presents the single question of what principle is to be applied where, from an absence of an opinion expressed by the court below, it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of

the federal questions, both being in the case. But the rule which controls such a situation has long prevailed and was clearly expressed in *Allen v. Arguinbau*, 198 U. S. 149, 154, 155, 49 L. Ed. 990, 993, 25 Sup. Ct. Rep. 622, where a writ of error to the supreme court of Florida was dismissed as follows: 'The supreme court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad; but if the judgment rested on two grounds, one involving a federal question and the other not, or if it does not appear on which of the two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 41 L. Ed. 72, 16 Sup. Ct. Rep. 939; *Klinger v. Missouri*, 13 Wall. 257, 20 L. Ed. 635; *Johnson v. Risk*, 137 U. S., 300, 34 L. Ed. 683, 11 Sup. Ct. Rep. 111; *Bachtel v. Wilson*, 204 U. S. 36, 51 L. Ed. 357, 27 Sup. Ct. Rep. 243; *Adams v. Russell*, 229 U. S. 353, 57 L. Ed. 1224, 33 Sup. St. Rep. 846.

Dismissed for want of jurisdiction."

Also *Allen v. Arguinbau*, 198 U. S. 155; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63; *Klinger v. Missouri*, 13 Wall. 257.

And so, with the utmost deference, we submit that not only might the judgment of the supreme court of Mississippi have been based upon the ground that the plaintiff in error proved title to no more land than that bounded by the high water mark at the time of the avulsion, and hence have defeated the jurisdiction of this court, but that said court did, in fact, so place its decision, and did, in fact, decide nothing but the extent of ownership of plaintiff in error, which embraced, with deference we submit, only the seventy odd acres upon which it was paying taxes, and, with confidence we submit that being the case, the supreme court of the

State of Mississippi could very well have applied the maxim *allegans suam turpitudinem non est audiendus*.

An examination of the briefs in the supreme court of Mississippi will bear out these statements as to the basis of this decision.

III.

(b) The land in question was between the two levees and seems to have been subject to overflow—in fact the water brought the logs in question off when it came up. There was ample testimony of possession by these defendants in error of the property in question and of the doing by them of all acts of ownership whereof said land was capable. This would, as to this character of land have started the statute of limitations. *McCaughan v. Young*, 85 Miss. 293. With the right to determine the ownership upon this ground of adverse possession, there is no right to assign error here. The decision below is conclusive. *Railroad Co. v. Brewer*, 231 U. S. 249; *Donohue v. Vosper*, 243 U. S. 65; *Oil Co. v. Texas*, 212 U. S. 112. Wherefore as the decision could, by the supreme court have been placed upon this ground, the judgment should be affirmed.

(c) There is ample testimony in the record as to the location of the river a short time after the avulsion upon which to have based a decision for the defendants in error—how Pecan Lake was formed is testified expressly—this witness could have been cross examined and his testimony was for the jury; they evidently found it to be true. It will be seen that the plaintiff in error did not in the circuit court of Coahoma county treat the case as one in which that court could take judicial knowledge of the location of the line between the property of the several parties to this suit—on the contrary, the several parties tried the case not upon the judicial knowledge of the court, but upon evidence introduced. This was the way in which the matter was settled and it would not now be competent for the plaintiff in error, when the court has found his witnesses were not credible, when there was no motion for a continuance to say

that notwithstanding the course pursued by each of the parties in the trial of this case, that the court knew where the line was and should have decided the case upon what it knew and not what the plaintiff in error failed to prove. If the plaintiff in error wanted the case to be determined upon judicial knowledge, he should have so tried it below. He cannot try the matter there upon one theory, and losing, then set up another. *Communis error facit jus* under the decisions of the supreme court of Mississippi, and this being a local rule of law, error would not be predicable here thereof. *New Orleans, etc., Railroad v. Cole*, 101 Miss. 179; *Clisby v. Railroad Co.*, 78 Miss. 937. We challenge counsel to show any point in this record where there was a reliance upon judicial knowledge, the entire question was decided as one of fact. Being a question of fact, the jury were justified in deciding as they did and their decision is not reviewable here.

The Plaintiff in Error got far more in its instructions than it was entitled to—it applied the doctrine of accretion after the avulsion contrary to *Arkansas v. Tennessee* and numerous other cases. But notwithstanding the jury found for the defendants in error. In said instructions (R. 160, 161, 162) there is no hint of there being a Federal question in this case. The sole question is one of fact which under these instructions was to be and was decided by the jury.

No Federal question is shown to have been involved, because there was no opinion rendered by the State Supreme Court herein.

In addition to the citation of principles just covered, with deference we submit that the right of Defendants in Error and Plaintiffs in Error do not involve in any way the boundary between Arkansas and Mississippi.

It appears that the burden of proof was upon Plaintiff in Error. It furthermore appears that the Plaintiff in Error had to show title.

Now, in addition to not proving title below high water mark, it appears that the *locus in quo* was between the Arkansas and the Mississippi levees; and it furthermore appears that in truth and in fact a large part of the land was actually surveyed as a part of the State of Mississippi, and some of the actual cutting was upon land actually surveyed in Mississippi.

Note map of Plaintiff in Error showing the survey of Lot 1, Section 11, Coahoma County. The alleged trespass covered only 27.80 acres, and that a part of this was actually surveyed as Mississippi in 1833. But, as shown *supra*, the title of the Defendant in Error extended to the thread of the stream, and upon this the decision of the Supreme Court of Mississippi would be final, and upon any of said grounds the Supreme Court could have rested its judgment, and if it were so possible to have rested it, then, with deference, we submit that the Writ of Error should be dismissed, or, if entertained, affirmation entered, as hereinafter set forth. Authorities *supra*.

IV.

No Federal question was properly raised at the proper time.

With deference we submit that the only attempt to raise a Federal question was in the Petition for a written opinion, and for a re-argument, which is too late, under the universal practice on this behalf. *Meyer v. Richmond*, 172 U. S. 92; *Turner v. Richardson*, 180 U. S. 92.

V.

Said record containing no evidence to show where said line was between the States of Mississippi and Arkansas in 1848, the said Supreme Court was without power to reverse said decision of the Circuit Court, and if said decision is to be reversed it can be done only upon a Writ of Error directed to said Circuit Court of Coahoma County, not to the Supreme Court of the State of

Mississippi, whose jurisdiction is conditioned upon the error appearing in the record, and whose jurisdiction is limited strictly to that of a Court of Appeals.

The record herein fails to locate the boundary line between Mississippi and Arkansas in 1848.

The Circuit Court of Coahoma County was the Court of primary instance, and the power of the Supreme Court of Mississippi was limited and confined strictly to affirming or reversing the judgment of the Circuit Court of Coahoma County. Under Section 146 of the Constitution, said Court had only such jurisdiction as properly belongs to a Court of Appeals.

Now in the Circuit Court of Coahoma County no motion was made for a continuance of this cause until there should have been an adjudication in *Arkansas v. Mississippi*. No attempt was made to make the decision in this Court in that cause conclusive or binding.

The Supreme Court of Mississippi was presented with the record in which both parties had submitted their contentions to a jury, and each party had introduced what he contended to be all of the pertinent evidence, and this evidence was passed upon by a jury and the jury held that the facts were with the Defendants in Error.

Now it is held in *Boone v. McJunkin*, 63 Miss. 559:

“We know of neither an authority nor a principle upon which we can try on appeal the existence of a fact which has arisen since the judgment in the court below, or upon which the alleged fact, if now found to be true, would warrant a reversal of a judgment right when it was rendered. This Court can only reverse a case erroneously determined by the inferior court; a judgment right when rendered is not subject to reversal because of any fact arising after its rendition, and

which, if it had existed at the time, would have produced a different result."

Now the law in Mississippi is well settled that *communis error facit jus*.

Having tried this case upon this evidence without any reference to the judicial knowledge of the Court, even if this were available, the Plaintiff in Error cannot complain.

There is not the slightest pretense made to locate the steam boat channel at the date 1848. If, as was then the case, the shortest channel was sought, then said channel would surely have been close to the Arkansas shore. But the parties tried out this case on the theory that the shore lines were controlling factors, and Plaintiff in Error did not introduce a single solitary witness who attempted to prove where the steamboat channel was, even conceding this was a material factor.

In the absence of such proof, the presumption is that it was midway between the shores, and in such a case this presumption would give all of the area to the Defendants in Error.

Arkansas v. Tennessee, supra;
Ciana v. Tenn; supra.
State v. Keane, 84 Mo. App., 130;

Here each party introduced in the Circuit Court everything that was pertinent; everything that he desired to introduce, and the case was fought out without reference to any Federal question; and now after the case has been so decided upon full evidence introduced, then to attempt to inject a Federal question is, we submit, impossible when a proper predicate therefor has not been laid.

VI.

But should we be in error in all of the foregoing,

and this Court should assume jurisdiction as having been properly obtained upon the Writ of Error, then we submit:

(1) There are ample grounds shown by the record, independently of such Federal question, upon which the Supreme Court of Mississippi could, and did, in fact, place its decision, embracing—

(a) The fact that Plaintiff in Error did not have title to the State boundary line.

(b) That possession of Defendants in Error gave them title as against all parties save the State of Arkansas.

(c) That Plaintiff in Error was without right as against Defendants in Error, irrespective of the sovereignty of the States in the premises.

(d) Adverse possession.

(e) The *communis error* doctrine.

Now, these points have been covered, *supra*, upon the motion to dismiss, and are only referred to so as to present a consistent whole.

(2) Because both the Supreme Court of the State of Arkansas and the Supreme Court of the State of Mississippi have fixed upon the same thread of the stream as a dividing line, which will be conclusive upon this Court.

It appears that under the decision of this Court in *Iowa v. Illinois*, 147 U. S. 1, reaffirmed in *Arkansas v. Tennessee*, that the middle of a river is to be fixed along the middle of the deepest channel, but as was said by Mr. Cresey, *prima facie* the middle of the stream between the two high banks is the boundary line unless it is proved that the navigable channel which vessels habitually use is elsewhere. In this case there is no such proof.

Under the law of the State of Arkansas, the decision made as to the navigable channel, as contradistinguished from the middle of the stream, is not recognized, and in both Arkansas and Mississippi, the dividing line is held to half way between the fixed and permanent banks of the stream.

The leading case upon this point in Arkansas is *Sessell v. State*, 40 Ark. 501, wherein the Mississippi case of *Morgan v. Redding*, 3 S. & M. 697, is quoted with approval, and the decision in the instant case is an approval by the Supreme Court of Mississippi of the doctrine therein contained.

See, also, *Delaney v. State*, 88 Ark. 311,

Wolfe v. State, 104 Ark. 143,

and the leading case of *Tennessee v. Pulp Co.*, 119 Tenn., 47, is approved and quoted from; 181 S. W. 295; and also in *Kinnaire v. State*, 106 Ark. 113.

We, therefore, with deference submit that the dividing line between Arkansas and Mississippi could not have been further west at this point than the middle of the Mississippi River as fixed by the banks upon each side, notwithstanding the opinion in *Arkansas v. Tennessee*.

Now, it appears that the river here is about a mile wide; and it furthermore appears by a fixation of this as the width, that the locus of the trespass could not have occurred in Arkansas.

Lot 1 (One) is accurately located, and it appears from the evidence that in 1857 there was an overflow in the month of July, whereunder there was a break in the levee and the formation of Pecan Lake,—at least the jury were so warranted in finding it.

Under no possible theory could the steamboat channel as attempted to be delineated upon the exhibits for

Plaintiff in Error, be fixed as the boundary, because—

(a) The Supreme Court of Mississippi and the Supreme Court of Arkansas have not adopted this as the true boundary line, and it is only when there is a contrariety of judicial decision that this Court is called on to make an adjudication. Where both States acquiesce in the fixation of a boundary, then that line becomes the boundary and is conclusive of all persons.

(b) But the record here wholly fails to disclose the location of the steamboat channel, even admitting that it has any bearing upon the instant case, and, therefore, under *Iowa v. Illinois*, 147 U. S. 1, the boundary line is fixed as midway between the two shores, there not being any evidence to overcome the *prima facie* presumption there shown to exist under the authorities. No witness now alive can testify and no records were shown.

With this as a boundary, Plaintiff in Error could have no case, even though his ownership should extend beyond the high water mark, which it did not.

(3) The map introduced by Calhoun is very inaccurate as to the location of the island which is shown upon the plat made in 1817 when Arkansas was surveyed.

It will be seen that at this date this island was in the middle of the Mississippi River and most likely the thread of the stream ran to the north of it.

Furthermore, it was not surveyed at that time as a part of the State of Arkansas. That is certain.

Now the survey of Mississippi occurred in 1833 and shows no island formation whatsoever.

Now it is entirely possible that this island has never been surveyed and that it is still un-surveyed and for that reason it is a part of the State of Mississippi, because if the Government had intended the land to be a part of Arkansas it would at that time have surveyed said island, as a part and parcel of Sections 22 and 23, and have given

to Sections 22 and 23 a greater acreage than 56.33 and 12.09 acres. In short, this island, as such, in 1817, would have constituted a part of these two sections, and yet when the area of the sections is given, it does not appear to contain any of this acreage; and, therefore, with deference we say that the true boundary between Arkansas and Mississippi was mid-way between the two banks of the river, and given that factor, Plaintiff in Error's case vanishes.

(3) That in this record seeking to reverse the judgment of the Circuit Court of Coahoma County, there is no proof whatever as to where the line was in 1848 at the time of the avulsion, and the burden of proof being upon the Plaintiff in Error, judgment final should have been directed for the Defendant in Error for want of sustaining proof.

Now Plaintiff in Error having the burden of proof has failed to show the line in 1848, and the burden of proof being upon Plaintiff in Error, with deference we submit that judgment final could have been rendered on a peremptory instruction for Defendants in Error, and that there was no proof whatever by the Plaintiff in Error which would have in any wise entitled him to relief under the foregoing facts.

(4) The evidence shows that the correct line put all of the land on which this timber was cut, within the State of Mississippi wholly irrespective of any Federal question.

With deference we submit the entire parcel of land here in controversy is, as heretofore shown, within the State of Mississippi, without any necessity for the application of the doctrine of what may be established in the case of *Arkansas v. Mississippi*.

(5) The Supreme Court of the State of Mississippi was without authority to reverse the judgment of the

Circuit Court of Coahoma County, Mississippi, unless it affirmatively appeared that there was error in said record.

With deference, as hereinbefore pointed out under the *McJunkin* case, 63 Mississippi, the Supreme Court of Mississippi, was without authority to reverse this judgment.

Respectfully submitted,

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I hereby certify that I mailed, postage prepaid, by registered letter, to Mr. Herbert Pope, on April..... 1918, to his postoffice address, Monadnock Building, Chicago, Ill., a true copy of this brief, this April..... 1918.

GARNER W. GREEN,
Of Counsel for Defendants in Error.

8.

Office Supreme Court, U. S.
FILED

APR 25 1918

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No.  171

RUST LAND & LUMBER CO.,
Plaintiff in Error,
vs.

ED JACKSON, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS
OR AFFIRM.

HERBERT POPE,
Attorney for Plaintiff in Error.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. 471

RUST LAND & LUMBER CO.,
Plaintiff in Error,
vs.
ED JACKSON, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO
DISMISS OR AFFIRM.

Plaintiff in error respectfully submits that, in accordance with the decision of this court in *Cissna v. Tennessee*, 242 U. S., 195, the disposition of this motion to dismiss or affirm should be continued until the final hearing, and that this cause should be set for final hearing at the same time as or after the hearing in the case of *Arkansas v. Tennessee*, No. 6 original, now pending in this court. The case at bar presents a situation which, in all material respects, is identical with that presented in the case of *Cissna v. Tennessee*, *supra*, as will appear from a short statement of the facts in the case at bar. These material facts are not stated in the so-called "Statement of the Case" contained in the brief for defendants in error.

STATEMENT.

This replevin suit was commenced in the Circuit Court of Coahoma County, Mississippi, and was submitted to a jury under instructions by the court (Rec., 160-162), which made the success of the plaintiffs (defendants in error here) or of the defendant (plaintiff in error here) depend upon a determination under the evidence submitted of the question whether the land on which the timber in controversy was cut was located in the State of Mississippi or the State of Arkansas. The rights of the parties under the instructions of the court were made to depend upon the ownership of the land in question, and this ownership in turn depended upon whether this land was found to be in the State of Mississippi or the State of Arkansas.

It was stipulated and agreed between the parties that the title to Lots 1 to 9 inclusive of Section 11, Township 28, Range 5 West, in the County of Coahoma and State of Mississippi, is vested in certain persons from whom defendants in error had authority to cut timber on said lots; that the title to Section 22 and Section 23 in Township 4 South, Range 4 East in Phillips County, Arkansas, is vested in plaintiff in error. (Rec., 23.) The land referred to as belonging to plaintiff in error is located on what is known as Horseshoe Island, and the land in question in this case is also located on Horseshoe Island and adjoins this land on the south. The Mississippi lots referred to as belonging to the persons under whom defendants in error claim are separated from the land in question in this case by a body of water known as Old River or Pecan Lake which is now about 900 feet in width. (Rec., 54 and maps.) The question in litigation in this

cause is whether the land on which the timber in controversy was cut is located in the State of Mississippi, and was formed by accretions to the Mississippi shore, or is located in the State of Arkansas and belongs to plaintiff in error.

The Circuit Court shifted the burden of proof from the plaintiffs to the defendant and then instructed the jury (Rec., 160) that "it devolves upon the defendant to show, by a preponderance of the evidence that it is the owner of the land from which the timber was cut before defendant can recover in this case," and also:

"That unless the Rust Land Company has shown to the satisfaction of the jury, by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company in the State of Arkansas, or was north and east of a channel of the Mississippi River where the cut-off 1848 occurred, then they will find for the plaintiffs."

The cut-off of 1848 referred to in this instruction involved the making of a new channel by the Mississippi River, which in that year cut across the points of a horse-shoe-shaped channel formed by the old course of the river, and left an island known as Horseshoe Island between the old and new channels. The old channel, however, still contained, after the cut-off, a considerable body of water, continued to be a navigable channel (Rec., 157), and some parts of what is known as Old River still contain water of a considerable depth which is at some points several hundred yards in width. (Rec., 54.)

The court further instructed the jury (Rec., 161),

"that if they believe from the evidence that the body of water shown on the maps introduced in evidence in this case, and called Old River or Pecan Lake is between the Mississippi shore and the land on which the timber in controversy in this suit was growing, and that this body of water was the last channel of

the river as it dried up between the island and the shore of Mississippi, and that the said lands on which the said timber was growing, is not attached to the Mississippi shore or any accretions formed or attached thereto, then the jury will find for the defendant."

Under this instruction it was necessary that the jury should find from the evidence that the land in question was located in the State of Mississippi in order to find for defendants in error. If, on the other hand, they found that the land was not in Mississippi, they must find for plaintiff in error.

The instructions of the trial court were intended to state the rules of law which govern the determination of the boundary line between two states, under the rule stated by this court, when an avulsion has occurred in the river forming such boundary line, and a new channel has been formed; but the instructions given obviously do not state the rule governing such a case as it has been stated and applied by this court.

The jury returned a verdict for the plaintiffs (defendants in error here) and the judgment entered provided as follows (Rec., 164):

"It is therefore ordered and considered by the court that the defendant restore to the plaintiffs (naming them) the property levied on herein and in default thereof that said plaintiffs do have and recover of the defendant, the Rust Land & Lumber Company, and the United States Fidelity & Guaranty Company of Baltimore, Md., the sureties on their bond, the sum of thirty-six hundred (\$3,600) dollars and all costs in this behalf expended for which execution may issue."

An appeal was taken to the Supreme Court of Mississippi by the defendant, Rust Land & Lumber Company, and an appeal bond was given with the United Casualty & Surety Company as surety. No appeal was

taken by the United States Fidelity & Guaranty Company, the surety on the replevin bond in the Circuit Court.

On March 6, 1916, while this cause was pending in the Supreme Court of Mississippi, the plaintiff in error, the Rust Land & Lumber Company, made the following motion (Rec., 178):

"Comes Rust Land & Lumber Company, appellant, and moves the court to continue this case and stay the trial thereof until a certain cause pending in the Supreme Court of the United States, No. 6, Original, on the docket thereof, styled *State of Arkansas v. State of Mississippi*, is determined by that tribunal, and for cause of said motion shows as follows:

The issue in controversy in this case is the boundary lines between the State of Arkansas and the State of Mississippi, the appellees claiming under a grant from the State of Mississippi and the appellant claiming under a grant from the State of Arkansas. So that, the real question involved in this case, determinative of the rights of the parties, is the true boundary line between the said states at the place from which the timber involved in this suit was cut.

There is pending in the Supreme Court of the United States, and ready for the taking of testimony therein, said cause between the States of Arkansas and Mississippi, which involves only the true boundary line between said states at the very point in controversy in this suit, so that, a determination of the boundary line by the Supreme Court of the United States, which has the final jurisdiction thereof, will determine the boundary line between said states, and whether the land involved is in the said State of Arkansas, as claimed by appellant, or in the State of Mississippi, as claimed by appellees is the basis of contention in this case.

Wherefore appellants move the court to stay the trial of this action until the determination of said boundary at the very point in controversy in this case, until such determination by the Supreme Court of the United States has been made.

In support of said motion, appellants file here-

with a copy of the original bill in the Supreme Court of the United States, and a copy of the motion for the appointment of a commissioner and a stipulation for the taking of proof therein."

This motion was at first sustained and the cause continued, but subsequently, on motion of attorneys for defendants in error (Rec., 179, April 7, 1916), the continuance was set aside and the cause was placed on the docket for call at the October term. (Rec., 180.)

Subsequently, on December 23, 1916, the Supreme Court of Mississippi affirmed the judgment of the Circuit Court without an opinion. (Rec., 171.) Counsel for plaintiff in error thereupon filed a petition for rehearing (Rec., 171-175) in which the attention of the Supreme Court of Mississippi was again called to the fact that the decision of the court necessarily involved a decision of the boundary-line question between the States of Mississippi and Arkansas, and that that question was then pending for final determination in this court in a case between the two states. The attention of the court was also called to the decision of this court in *Cissna v. Tennessee*, *supra*, and it was pointed out that even this court did not consider that it should decide a private suit involving the boundary between two states while another case between the two states was then pending in this court which involved the determination of the same boundary question. (Rec., 175.)

This motion for rehearing was denied by the Mississippi Supreme Court, and the court also denied a motion that it file a written opinion in the case. (Rec., 179.)

A petition for a writ of error from this court to the Supreme Court of Mississippi was then presented to this court and the writ issued. (Rec., 191-192.)

The judgment entered in the Supreme Court of Mis-

Mississippi recites that the court having examined the record in this cause, "*and being of opinion that there is no error therein* doth hereby order and adjudge that the judgment of said Circuit Court rendered in this cause at the December term, 1913, on the 3rd day of December, 1913, *be and the same is hereby affirmed.*" The judgment then goes on to provide "that appellees do have and recover of appellant and the *United States Casualty Company*, surety in the supersedeas bond, the sum of thirty-six hundred (\$3,600) dollars," etc. (Rec., 171.)

The surety in the supersedeas bond was in fact the United Casualty & Surety Company. (Rec., 166.) The United States Casualty Company was not a party to the record in any capacity and the judgment against it, to whatever error it may be due, must, as will be shown, be treated as a nullity on this record. There is no judgment shown in this record against the United Casualty & Surety Company, the surety on the appeal bond, and even if the record were made to show such a judgment, we contend that it would not be a necessary party to this writ of error.

As to the third surety company mentioned in the record—the United States Fidelity & Guaranty Company, the surety on the replevin bond in the Circuit Court—the Supreme Court of Mississippi has necessarily held, as we shall show, that it was not a necessary party to the appeal to that court, and if this is so it is, as we shall contend, not a necessary party to this writ of error.

BRIEF OF ARGUMENT.

I.

NONE OF THE SURETY COMPANIES MENTIONED IN THE RECORD
IS A NECESSARY PARTY TO THE WRIT OF ERROR.

1. *The United States Fidelity & Guaranty Company—surety on the replevin bond in the Circuit Court—was not a necessary party to the appeal from the Circuit Court of Coahoma County to the Supreme Court of Mississippi, and is not a necessary party to the writ of error from this court to the Supreme Court of Mississippi.*

The judgment in the Circuit Court is a judgment, first, that the Rust Land & Lumber Company restore to the plaintiffs the property levied on, and, second, and in default thereof, a judgment that the plaintiffs recover of the Rust Land & Lumber Company and the United States Fidelity and Guaranty Company a sum of money specified.

This judgment is not only in terms a several judgment, but the Supreme Court of Mississippi recognized the right of plaintiff in error to a separate appeal by affirming the judgment in this case.

The Supreme Court of Mississippi has recently held that a surety on a bond in the trial court is not a necessary party to an appeal by the principal from a judgment against both, though the supersedeas inures to the benefit of the surety as well as the principal.

Jayne v. W. B. Nash Lumber Co., 66 So. R., 813.

Other courts have held the same in such cases.

The New York, 104 Fed., 561. (Opinion by Judge Lurton.)

The Glide, 72 Fed., 200.

Love v. Export Storage Co., 143 Fed., 1, 11.

Wren v. Peel, 64 Tex., 374.

Henry v. Whitehurst, 64 So. Rep. (Fla.), 233.

In such case the surety continues to be a surety after the judgment is rendered.

Newell v. Hamer, 4 How. (Miss.), 684.

This court has also held that where the judgment is distributive, as in the case at bar, a separate appeal or writ of error is maintainable.

Estis v. Trabue, 128 U. S., 225, 229.

2. No judgment appears in this record against the United Casualty & Surety Company, surety on the appeal bond, and even if the judgment in the Supreme Court of Mississippi were against that surety company instead of the United States Casualty Company, the United Casualty & Surety Company would not be a necessary party to the writ of error.

The judgment against the United States Casualty Company—not a party to the record—must be treated as a nullity.

Overstreet v. Davis, 24 Miss., 393.

The judgment in the Supreme Court of Mississippi is, in any case, a several judgment in terms against plaintiff in error.

Estis v. Trabue, *supra*.

The New York, *supra*.

Winters v. United States, 207 U. S., 564.

See also:

Inland & Seaboard Coasting Co. v. Tolson, 136 U. S., 572.

The Mississippi Supreme Court holds that a separate appeal by the principal is maintainable in such cases.

Jayne v. W. B. Nash Lumber Co., 66 So. Rep., 813.

The reason for the rule that all parties to a joint judgment must be joined in the writ of error does not apply in such cases.

Hardee v. Wilson, 146 U. S., 179.

Evans v. Stone & Brick Co., 20 Wyo., 188.

If it should be held that the surety in the appeal bond is a necessary party to the writ of error, then leave is hereby asked to amend the writ by inserting the name of the surety.

Inland & Seaboard Coasting Co. v. Tolson,
supra.

II.

A FEDERAL QUESTION IS SHOWN TO BE INVOLVED BY THE
RECORD IN THIS CASE.

1. *The decision of the Mississippi Supreme Court involved an erroneous determination of the boundary line between the States of Mississippi and Arkansas.*

Cissna v. Tennessee (decided by this court March 11, 1918).

(a) The contention of counsel for defendants in error that the Supreme Court of Mississippi might have affirmed the judgment of the Circuit Court on the ground that plaintiff in error is not entitled to accretions to the Arkansas shore in Arkansas after the avulsion in 1848 cannot be sustained on this record.

Moreover, it will not be assumed, in the absence of an opinion, that the Mississippi Supreme Court adopted an erroneous rule of law.

The usual rule as to accretions is the law of Arkansas and there is no case holding that it does not apply on an old channel after an avulsion.

See:

Nix v. Pfeifer, 73 Ark., 199.

Cooley v. Golden, 117 Mo., 33.

Benecke v. Welsh, 67 S. W. Rep. (Mo.), 604.

(b) The judgment could not have been affirmed on this record on the ground of adverse possession of the land by defendants in error.

(c) There has been no action by the courts of Arkansas and Mississippi which could make the boundary line a line equally distant from the shore lines instead of the middle of the navigable channel.

State of Arkansas v. State of Tennessee (decided by this court March 4, 1918).

2. *The decision of the Supreme Court of Mississippi denied the federal rights of plaintiff in error by overruling its motion that this cause be continued to await the determination of the suit between the States of Mississippi and Arkansas then pending in this court (No. 6 Original) to settle the boundary line between the two states at the point involved in this cause.*

The question of the boundary line not only arises under federal statutes, but can be finally and conclusively settled only by a decision of this court in a case in which the two states are parties which will be binding not only upon such states but upon all persons and all inferior courts. The pendency of such a proceeding presents a question which is peculiarly federal in its nature, and the motion in this cause calling attention to the pending suit in this court necessarily drew in question an authority exercised under the United States.

3. *The boundary question between the two states was a federal question which was raised and decided both in the Mississippi Supreme Court and in the Circuit Court.*

The Mississippi Supreme Court, with full knowledge of the federal nature of the question involved, affirmed the judgment of the Circuit Court.

The Circuit Court was not only bound to, but did in fact in its instructions, take judicial notice of the federal nature of the boundary line question.

A federal question is raised if "such question were necessarily involved in the disposition of the case by the state court."

Kaukauna Co. v. Green Bay, etc., Canal, 142
U. S., 254, 269.

ARGUMENT.

I.

NONE OF THE SURETY COMPANIES MENTIONED IN THE RECORD
IS A NECESSARY PARTY TO THE WRIT OF ERROR.

Counsel for defendants in error contend that the United States Fidelity & Guaranty Company, the surety on the replevin bond in the Coahoma County Circuit Court, and the United Casualty & Surety Company, the surety on the appeal bond in the Mississippi Supreme Court, are both necessary parties to the writ of error. (Brief for defendants in error, 4-6.)

We contend that neither one of these surety companies is a necessary party to the writ of error, and that the surety company in fact mentioned in the judgment of the Supreme Court of Mississippi—the United States Casualty Company—is not a necessary party either.

1. *The United States Fidelity & Guaranty Company was not a necessary party to the appeal from the Circuit Court of Coahoma County to the Supreme Court of Mississippi, and is not a necessary party to the writ of error from this court to the Supreme Court of Mississippi.*

The United States Fidelity & Guaranty Company was the surety on the replevin bond in the Circuit Court of Coahoma County. The judgment in that court provides as follows (Rec., 164):

“It is therefore ordered and considered by the court that the defendants restore to the plaintiffs (naming them) the property levied on herein and in default thereof that said plaintiffs do have and recover of the defendant the Rust Land & Lumber Company and the United States Fidelity and Guar-

anty Company, of Baltimore, Md., the sureties on their bond the sum of thirty-six hundred dollars (\$3,600) and all costs in this behalf expended for which execution may issue."

This judgment is a judgment, first, that the Rust Land & Lumber Company restore to the plaintiffs the property levied on, and, second, and in default thereof, a judgment that the plaintiffs recover of the Rust Land & Lumber Company and the United States Fidelity and Guaranty Company the sum of money specified.

The judgment—that the Rust Land & Lumber Company restore the property levied on—is a several judgment which entitled the Rust Land & Lumber Company to take a separate appeal to the Supreme Court of Mississippi, and the affirmance of the judgment by that court was necessarily a decision upon this question. Otherwise the appeal should have been dismissed. If this is not so, and the contention of the defendants in error is correct, they can proceed at once against the United States Fidelity and Guaranty Company on the judgment against it without attempting to have this writ of error dismissed.

Not only was the affirmance of the judgment in this case by the Supreme Court of Mississippi a decision that the United States Fidelity and Guaranty Company was not a necessary party to the appeal to that court, but the Supreme Court of Mississippi has expressly held in a very recent case (1914) that a surety on a bond who is made a party to a judgment in the trial court is not a necessary party to an appeal by the principal.

In *Jayne v. W. B. Nash Lumber Co.*, 66 So. R., 813, the sureties on an attachment bond in the trial court were not made parties to the appeal by the principal from the judgment in the trial court, although a judgment was

rendered against them in the trial court. The sureties on the attachment bond were also made sureties on the appeal bond in the Supreme Court. That court held that this was an error—that they could not be sureties on the appeal bond because they were parties to the judgment in the trial court, although they were not necessary parties to the appeal taken by the principal, and said:

“It is true that the sureties have not appealed from this judgment. Neither are they necessary parties thereto; but nevertheless the supersedeas thereby obtained inures as much to their benefit as it does to that of appellant.”

The appellant was given thirty days within which to execute another appeal bond.

In the case at bar it is clear that the order contained in the judgment of the Circuit Court for the delivery of the property by the Rust Land & Lumber Company is held in abeyance by the supersedeas and will only become effective after a final determination of this cause. Until there is a final judgment against the plaintiff in error there can be no recovery against the surety in the replevin bond. The surety remains a surety in such case even after the rendition of a judgment against its principal and against itself.

Newell v. Hamer, 4 How. (Miss.), 684.

Other courts where this same question has arisen have held that the surety company is not a necessary party to an appeal or writ of error sued out by the principal, but nevertheless enjoys the benefit of the appeal by the principal.

In *Wren v. Peel*, 64 Tex., 374, the court held that a surety on a replevin bond could not be sued on the judgment against a principal and surety pending a writ of error prosecuted by the principal from the judgment.

In *Henry v. Whitehurst*, 64 So. R. (Fla.), 233, it was also held that where the defendant in an action of replevin prosecuted a writ of error the appeal inured to the benefit of the surety in the replevin bond who did not appeal, as well as to the benefit of the principal.

This question was carefully considered in an opinion by Judge Lurton in the case of *The New York*, 104 Fed., 561, in which the Circuit Court of Appeals for the Sixth Circuit held that a surety in a stipulation was not a necessary party to an appeal, although joined in the judgment in the trial court. In this case Judge Lurton said (pp. 563-565):

"If the decree or judgment be joint in form, but in law or fact separable, the mere form of the decree will not make it such a joint decree as to require those nominally joined to unite in appellate proceedings. *Hanrick v. Patrick*, 119 U. S. 156, 163, 7 Sup. Ct. 147, 30 L. Ed. 396. The decree complained of is, in substance, that the libellant, the Erie & Western Transportation Company recover from the Union Steamboat Company 'and the American Surety Company, its surety, upon the bond or stipulation herein filed,' etc. * * * Though joint in form, if in law or fact the decree is separable it was not necessary that the surety company should join the Erie & Western Transportation Company in the particular appeal shown to have been allowed in this case. The stipulation upon which the surety company became bound as surety was one entered into under section 911, Rev. St. U. S., and admiralty rule 21. Such a stipulation stands in the place of the vessel, and its obligation is discharged by compliance with the order or decree of the court against the owner or claimant, and the liability may be enforced by 'judgment thereon against both the principal and sureties' at the time of rendering the decree in the original cause. * * *

"* * * We fail to see any greater reason for regarding the stipulators, sureties in such a bond, as necessary parties to an appeal, than there is for regarding the sureties in a cost bond as parties to the

controversy. In both cases the principal controls the litigation and the sureties are bound by the result. In both cases, if a question arises as to the obligation of the surety, the latter, to the extent of this interest, should be heard, and for this purpose might appeal. Undoubtedly, if the suit is upon a bond, and the judgment is against the surety as well as the principal, both must join. But the reason is that the bond and its obligation is then the thing in controversy, and constitutes the subject matter of the litigation. To this class of cases the case of *Estis v. Trabue* belongs."

See, also:

The Glide, 72 Fed., 200.

Love v. Export Storage Co., 143 Fed., 1, 11.

So far as the Mississippi cases cited by counsel for defendants in error in their brief are concerned (Brief, 6-7) it is necessary to say only that they state the general rule in the case of joint judgments against two or more defendants. If the early case of *Thomas v. Wyatt*, 17 Miss., 309, can be considered as stating a different rule, it is overruled by the recent case of *Jayne v. W. B. Nash Lumber Co.*, *supra*.

In support of their contention counsel also cite several cases in this court in which a similar rule has been stated with reference to joint judgments, but this court has always recognized that the judgment may in fact be distributive so as to constitute a separate judgment against one of the parties.

This is recognized in *Estis v. Trabue*, 128 U. S., 225, one of the cases relied upon by counsel for defendants in error. (Brief, 5.) In that case the court said (p. 229):

"The judgment is distinctly one against 'the claimants and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond' jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as

containinng a separate judgment against the claimants and another separate judgment against the sureties, or as containinng a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants."

The judgment, however, in the case at bar is distributive in the very sense referred to in this opinion. There is a separate judgment against plaintiff in error, Rust Land & Lumber Company, and another judgment against that company and the United States Fidelity and Guaranty Company which is expressly made conditional upon the default of the Rust Land & Lumber Company in the performance of the first judgment. Under the rule announced by this court, therefore, the surety mentioned in the judgment in the Circuit Court would not be a necessary party to the writ of error in this case even if that writ were directed to the Circuit Court. The writ of error is in fact directed to the Supreme Court of Mississippi, and the judgment entered by the Supreme Court of Mississippi in this cause has determined beyond the possibility of controversy that the surety in the replevin bond in the Circuit Court was not a necessary party to the appeal to the Supreme Court of Mississippi. The affirmance by that court of the judgment of the Circuit Court on the appeal of the Rust Land & Lumber Company alone is conclusive of this question. That the surety company is not a necessary party to the appeal is also settled by the decision in *Jayne v. W. B. Nash Lumber Co.*, 66 So., 813, cited *supra*. It is not necessary or possible to join in the writ of error to the Supreme Court of Mississippi a surety company which was not made a party and which was not a necessary party to the cause in the Supreme Court of Mississippi.

We submit, therefore, that there is no ground on which the United States Fidelity and Guaranty Company can

be held to be a necessary or proper party to the writ of error in this cause.

2. *No judgment appears in this record against the United Casualty & Surety Company, surety on the appeal bond, and even if the judgment in the Supreme Court of Mississippi were against that surety company instead of the United States Casualty Company, the United Casualty & Surety Company would not be a necessary party to the writ of error.*

As already pointed out in the statement, *supra*, the judgment in the Supreme Court of Mississippi first affirms the judgment of the Circuit Court, and then provides that defendants in error recover of plaintiff in error and the United States Casualty Company the amount of the judgment in the Circuit Court, with costs. The United States Casualty Company mentioned in this judgment is not a party to the record in any capacity, and the judgment against it must therefore be regarded as a nullity. This has been held in a Mississippi case—*Overstreet v. Davis*, 24 Miss., 393—in which it was held that a judgment against a defendant and another person as surety should be treated as a nullity so far as the surety was concerned when it appeared that the person named as surety was not in fact a party to the record.

But even if the surety mentioned in the judgment were the United Casualty & Surety Company—the surety in the appeal bond—we contend that that company would not be a necessary party to the writ of error.

The judgment in the Supreme Court of Mississippi is as clearly distributive as the judgment in the Circuit Court. The court in the first instance affirms the judgment of the court below against the plaintiff in error, the Rust Land & Lumber Company, and then provides for a recovery by the defendants in error from the plain-

tiff in error and the surety company of the amount mentioned in the judgment in the Circuit Court. The United Casualty & Surety Company was not a party to the replevin suit in the Circuit Court nor a party to the judgment in that court, and the order affirming the judgment of the Circuit Court was not an order against it. It was an order against the plaintiff in error, the party appealing, affirming the judgment of the Circuit Court against that company. The judgment against the plaintiff in error was necessarily a separate judgment, which entitled the plaintiff in error to sue out the writ of error from this court without joining the surety company, even if the surety company mentioned in the judgment had been the United Casualty & Surety Company. This is clear from the language of this court in the case of *Estis v. Trabue*, quoted, *supra*.

See, also, the opinion of Judge Lurton in *The New York, supra*, and *Winters v. United States*, 207 U. S., 564.

Not only, therefore, is the judgment of the Mississippi Supreme Court a several judgment under the rule as stated in this court, but there can be no question that it is so under the Mississippi practice. This is shown, not only by the order of the Supreme Court of Mississippi affirming the judgment of the Circuit Court in this cause in the absence of the surety company mentioned in the judgment in the court below, but by the express decision of the Mississippi Supreme Court in the very recent case of *Jayne v. W. B. Nash Lumber Co.*, cited, *supra*. Under the practice in Mississippi, a judgment against a surety company in a supersedeas or forthcoming bond is a conditional judgment so far as the surety company is concerned. The relationship of principal and surety continues after the judgment as before, so that the principal in the judgment can appeal without joining the surety company, while, at the same time, the

surety company has the benefit of the appeal by the principal. The character of the judgment of the Supreme Court of Mississippi in this cause must be determined by the Mississippi practice, and that no surety company in the record in this cause is a necessary party to the writ of error in this case is settled by the character of the judgment in the Mississippi Supreme Court, to which the writ of error is directed.

That the surety company in this case is not a necessary party to the writ of error is further shown by the cases in this court which state the reason for the rule that all parties to a judgment which is joint only must be joined in the writ of error. This reason is stated in the cases cited by counsel for defendants in error. (Brief, 5.) In one of these cases, *Hardee v. Wilson*, 146 U. S., 179, it appears that the reason for the rule adopted in such cases is that otherwise the party not appealing could not perhaps be proceeded against and would not be estopped from bringing another appeal for the same matter. This objection obviously would not apply in a case where the judgment appealed from was a judgment against a principal and a surety, and the principal alone appealed under a practice which recognized that the surety in the judgment was still only secondarily liable and was entitled to the benefit of the appeal by the principal. This is the practice in Mississippi, as we have shown, and it is clear, therefore, that the writ of error in this case, which is sued out by the principal alone, will operate for the benefit of the surety company, which is not joined in the writ, and will enable this court to dispose finally of the whole case.

This question was considered in the recent case of *Evans v. Stone & Brick Co.*, 20 Wyo., 188, in which many cases are reviewed, and the court held that a surety on

an appeal bond from a justice court was not a necessary party to a writ of error from the Supreme Court to review the judgment of the lower court, which, in form, was a joint judgment against the principal and surety.

Finally, we call the attention of the court to the case of *Inland & Seaboard Coasting Co. v. Tolson*, 136 U. S., 572, which evidently recognizes that the surety on an appeal bond in the court to which the writ of error issues may not be a necessary party to the writ of error, although the surety may be a party to the judgment.

In that case a judgment was recovered against the defendant in the Supreme Court of the District of Columbia, special term, and defendant appealed to the general term of the court, giving a bond with sureties. The general term entered a judgment affirming the judgment of the special term and providing, in addition, that the plaintiff recover the amount of the judgment in the court below against the defendant and the sureties in the bond. The writ of error from this court was sued out by the defendant alone and the sureties were not made parties. On motion, the writ of error was at first dismissed, but, subsequently, on motion of plaintiff in error, the case was restored to the docket, and the further motion of plaintiff in error, to amend the writ of error by inserting as plaintiffs in error the names of the sureties, was granted. No opinion was rendered in this case, but, on the motion to restore the cause to the docket, counsel for plaintiff in error pointed out that the judgment in that case, to which the writ of error was directed, in fact contained two separate judgments, one being a judgment affirming the judgment of the court below, and the other being a separate judgment on the undertaking to which the principal and the sureties were parties. (p. 575.) The correctness of this contention was evidently recognized by the court in restoring the

cause to the docket, although the additional motion to amend the writ of error by inserting the names of the sureties was also granted.

In any event, in the case at bar the argument that the judgment of the Supreme Court of Mississippi is several must be recognized as sound, not only by reason of the form of the judgment itself, but also by reason of the practice in Mississippi and the decisions of the Mississippi Supreme Court to which we have already referred.

We submit, therefore, that no surety company mentioned in the record in this cause is a necessary party to this writ of error. If, however, this court should allow the record to be corrected to make the United Casualty & Surety Co. a party to the judgment of the Supreme Court of Mississippi, or if that company should be regarded as a party to the judgment on the record as it stands, and this court should also consider that that company is a necessary party to the writ of error, then we ask leave, under the authority of *Inland & Seaboard Coasting Co. v. Tolson*, *supra*, to amend the writ of error by inserting the name of that surety company as a plaintiff in error.

II.

A FEDERAL QUESTION IS SHOWN TO BE INVOLVED BY THE RECORD IN THIS CASE.

In the statement of the case, *supra*, we have called attention to the fact that this cause was submitted to the jury in the Circuit Court of Coahoma County under instructions from the court which made it necessary for the jury to determine, under the evidence submitted, whether the land from which the timber in controversy was cut was situated in the State of Mississippi or the

State of Arkansas. If the jury found from the evidence "that the said lands on which the said timber was growing is not attached to the Mississippi shore or any accretions formed or attached thereto, then the jury will find for the defendant." (Rec., 161.) The jury in fact found for the plaintiffs (defendants in error), which means that the jury could not have found that the lands were "not attached to the Mississippi shore," but must have found that they were in Mississippi.

Other instructions given to the jury (Rec., 160-161) made the question of whether the lands were in Mississippi or Arkansas depend upon a determination of the boundary line between the two states in 1848, when, as the testimony shows, the Mississippi River made a new channel and formed an island, known as Horseshoe Island, which was surrounded by the old and the new channels of the river. The land in controversy in this case is situated on this island. Plaintiff in error contends that this island, including the land in controversy in this case, is, under the rules established by this court, in the State of Arkansas, and defendants in error contended in the Circuit Court of Coahoma County that the land in controversy is in Mississippi, because, before the cut-off of 1848, they claim that the channel of the Mississippi River was north and east of what is now marked as Old River or Pecan Lake on the maps introduced as exhibits in this cause. The instructions to the jury were based upon this issue between the parties and made it necessary for the jury to determine, under the evidence, whether the boundary line between the two states prior to the cut-off of 1848 was so located as to bring the land in controversy within the borders of Mississippi or Arkansas. If the then channel of the river was situated where Old River or Pecan Lake is now located, as shown by the maps, the instructions to the jury would indicate

that the lands in controversy are in Arkansas. If the then channel of the river (but not the thread of the navigable channel) was farther north and east, the jury might find the lands in Mississippi. Thus the location of the boundary line between the two states was, under the instructions of the jury, made the turning point in the case.

That this boundary line question was the controlling one in the case was repeatedly called to the attention of the Supreme Court of Mississippi after the case was in that court on appeal. It was pointed out, not only that the boundary line question was the controlling one in the Circuit Court, and that this was a federal question, but that there was then pending in this court a case between the two states (then No. 6 original) which involved the determination of the same boundary question. Before the case was decided by the Mississippi Supreme Court a motion was made to continue this cause until the case between the two states was decided, and a copy of the bill in the case in this court (which sets forth the federal statutes under which the boundary question arises) was filed with the motion to show that the same question was involved in both cases. (Rec., 178.) This motion was at first granted, but the order was later rescinded and the case decided. (Rec., 180.)

The motion for rehearing filed by plaintiff in error again called the attention of the Mississippi Supreme Court to the federal questions necessarily involved in this case, and set out at length the opinion of this court in the case of *Cissna v. State of Tennessee*, 242 U. S., 195, which had just been decided. The motion for rehearing was, however, overruled (Rec., 179) and the judgment of the lower court was affirmed without an opinion.

We respectfully submit, therefore, that there are pre-

sented in this case the same grounds of federal jurisdiction that were presented to this court in the case of *Cissna v. State of Tennessee*, recently decided by this court (March 11, 1918).

1. *The decision of the Mississippi Supreme Court involved an erroneous determination of the boundary line between the States of Mississippi and Arkansas.*

The Supreme Court of Mississippi, with full knowledge of the federal questions involved in this case, entered a judgment expressly finding "that there is no error" in the record of the case in the Circuit Court, and affirmed the judgment of that court. That judgment, however, under the instructions given, was based upon a finding which necessarily determined that the land in controversy was in the State of Mississippi and not in the State of Arkansas, and could not, as we contend, be affirmed on any other ground.

(a) Counsel for defendants in error suggest in their brief that the Supreme Court of Mississippi may have affirmed the judgment on the ground that the land did not belong to the plaintiff in error even though it was located in the State of Arkansas, and that this was a non-federal ground. (Brief, 9-13.) It is contended by counsel that "the right of plaintiff in error terminated at the high-water mark on the Arkansas shore in 1848, and did not reach to the thread of the stream, which was the boundary between Arkansas and Mississippi at that date, and which, by reason of there having been at that date an avulsion, has remained fixed from that time to this" (Brief, 9), and, further, that "a decision of the case of *Arkansas v. Mississippi* will establish a line that is distant at least half a mile (the Mississippi is about a mile wide at this point) from the line that is in controversy in the present case." (Brief, 11.)

But we respectfully submit that the Mississippi Supreme Court not only did not decide, but cannot be supposed to have decided the case on any such ground as is here suggested. On counsels' own statement of the contention it was necessary to find the boundary line between the two states in 1848 before the high-water mark on the Arkansas shore at that date could even be guessed at. The jury were not asked to determine that high-water mark at that date. The case was not submitted to the jury on any such theory, and there was no way, on this record, by which the Supreme Court of Mississippi could determine that the land in question was within a half mile of the boundary line between the two states in 1848, or at any place between the boundary line and high-water mark on that date.

Even if it be assumed, therefore, as a matter of law, that a riparian owner in Arkansas would not be entitled to accretions to his land on this Mississippi channel after 1848, there is nothing in the record which would enable the Mississippi Supreme Court to affirm the judgment of the Circuit Court on the ground that the land in question was formed by accretions to the Arkansas shore after 1848. The case was not submitted to the jury in a form which would make such a distinction possible. It was submitted to the jury to determine whether the land in question "was north and east of a channel of the Mississippi River when the cut-off of 1848 occurred" (Rec., 160), or whether it was situated on accretions to the Mississippi shore or accretions to the Arkansas shore, without reference to when such accretions may have occurred.

The Supreme Court of Mississippi, therefore, not only could not have based its affirmance of the judgment on the theory suggested, but obviously did not do so. The judgment of affirmance recites that this cause having

been submitted on the record herein the court is of opinion "*that there is no error therein.*" It is clear, therefore, that the judgment was affirmed on the ground on which the case was submitted to the jury in the lower court, and not on a ground inconsistent therewith, which would necessarily have required a reversal of the case and a new trial under instructions different from those actually given.

Furthermore, even if the facts in the case would admit of an affirmance of the judgment on the ground suggested by counsel for defendants in error, this court, in the absence of an opinion by the Supreme Court of Mississippi, will not assume that that court did in fact affirm the judgment on an erroneous theory of law. The contention of counsel is that, even if the land in question is in Arkansas, it was between the thread of the river and high-water mark on the Arkansas shore in 1848, and the then riparian owner could not acquire title to land added by accretions occurring after the avulsion in 1848. Counsel derive this conclusion from the fact that the boundary line between the two states, under the rule announced by this court, continued to be the same that it was prior to the avulsion. But this rule does not affect the local rule as to accretions on the old channel. No case in this court or in Arkansas or Mississippi is cited which supports such a conclusion in regard to accretions to the Arkansas shore. It is inconsistent with the instructions given to the jury in this cause, and, we submit, is inconsistent with the common law rule in such cases. There is nothing in the record in this cause, or in the cases cited by counsel for defendants in error, to show that the trial court did not state correctly the rule of law applicable in this case on the subject of accretions, and there is no ground, therefore, on which it can be assumed that the Supreme Court

of Mississippi affirmed the judgment on a different and erroneous theory of law. The question is a local one, and there is no ground for saying that the Supreme Court of Mississippi differed from the trial court, or that the trial court did not apply the correct rule of law in instructing the jury that the land in question belonged to the plaintiff in error if they found that it was formed by accretions to the Arkansas and not to the Mississippi shore. (Rec., 160-161.)

If it is proper, on this question, to refer to Arkansas cases, there can be no doubt that the usual rule as to accretions is the law of that state and that the riparian owner is entitled to additions to his land formed by accretions. In the case of *Nix v. Pfeifer*, 73 Ark., 199, the court discussed the usual rule as to accretions in connection with an abandoned channel without any suggestion that a different rule was applicable in such a case.

That the usual rule as to accretions would apply in the case of an abandoned channel is assumed in the following cases also:

Cooley v. Golden, 117 Mo., 33.

Benecke v. Welsh (Mo.), 67 S. W. Rep., 604.

It is obvious that any other rule would be wholly impracticable. If all private rights became fixed every time they were affected by an avulsion on such rivers as the Missouri and Mississippi it would be impossible in many cases to settle the rights of private owners on the banks of such rivers.

The abandoned channel in this case did not dry up after the avulsion of 1848. It continued to be a navigable channel after that date (Rec., 157), and Old River or Pecan Lake is still several hundred yards wide and sixteen or seventeen feet in depth. (Rec., 54.)

We submit, therefore, that there is no ground on which

it can be assumed that the Mississippi Supreme Court adopted an erroneous theory of law on the question of accretions to the Arkansas shore, when it affirmed without opinion the judgment of the Circuit Court, in which an entirely different theory of law was applied, on the ground that there was no error in the record.

(b) Counsel suggest also that the Supreme Court might have affirmed the case on the ground that the testimony showed adverse possession of the land by the defendants in error. (Brief for defendants in error, 14.) But counsel fail to point to the testimony which would sustain such a contention; there is no suggestion of it in the instructions to the jury, and we are confident it cannot be found in this record. The testimony, on the contrary, shows the lands in question were in the possession of plaintiff in error and that no claims were made by others until the trespasses involved in this case occurred. (Rec., 49-53 and 121.) The land in question adjoins the land which it is agreed in this record belongs to plaintiff in error (Rec., 23), while it is separated from the land in Mississippi on which defendants in error base their claim by a body of water which is today about 900 feet in width (Rec., 54), and the claim of plaintiff in error to the ownership of the land has been known for years. (Rec., 96-121.)

(c) Counsel further contend that the navigable channel as delineated on the exhibits for plaintiff in error in this cause should not be considered as indicating the boundary line between the two states, because the Supreme Courts of Mississippi and of Arkansas have both adopted a rule for the determination of such boundary lines which is different from the rule announced by this court. (Brief, 20-21.) They contend that, under the rule adopted by the two states, the boundary line should be, not the middle of the navigable channel, but a line

equally distant from the shore lines. It is settled, however, by the decision of this court in the recent case of *State of Arkansas v. Tennessee* (decided March 4, 1918) that such action of the courts of the two states could not have the effect contended for.

We contend that if the boundary line in controversy in this case were established in accordance with the rule applied by this court in such cases, the land in question would be found to be in the State of Arkansas.

2. *The decision of the Supreme Court of Mississippi denied the federal rights of plaintiff in error by overruling its motion that this cause be continued to await the determination of the suit between the States of Mississippi and Arkansas then pending in this court (No. 6 Original) to settle the boundary line between the two states at the point involved in this cause.*

Counsel for defendants in error contend that this cause, even though it involve the boundary line between the States of Mississippi and Arkansas, must be determined without reference to any decision of this court in the case between the two states; that, even if this court had decided the case between the two states before the Supreme Court of Mississippi decided this case, that court, in deciding this cause, must disregard the decision of this court fixing such boundary line and decide this case exclusively upon the record of the Circuit Court of Coahoma County. (Brief, 17-18.)

If this is so, then it would follow that, as between the parties to this cause, the land in question must always be held to be in the State of Mississippi, even though this court, in the case between the two states, should determine that it is within the State of Arkansas. The defendants in error could continue to cut timber off of this land, under the judgment rendered in this cause, on

the ground that the land is in Mississippi, even though the decision of this court in the pending case between the two states should determine that the land in question is in fact in the State of Arkansas.

We respectfully submit that this contention of counsel for defendants in error is unsound, and should not be sustained by this court. We contend that the motion of plaintiff in error in the Supreme Court of Mississippi to continue this cause, on the ground that there was then pending in this court a case between the two states to fix the boundary line between those states at the point involved in this cause, and the petition for rehearing presenting the same questions, necessarily raised a federal question, in that an authority exercised under the United States was drawn in question, and that the Supreme Court of Mississippi was legally bound to recognize that authority and should be controlled by that authority in the judgment entered in this cause.

There can be no question that when this court has finally fixed the boundaries between two states by its judgment in a suit between such states, its decision is binding and controlling upon that question and must be recognized by all inferior courts. No state court could thereafter treat the boundary line as being somewhere else than in the place fixed by the judgment of this court. It follows necessarily that where the authority to determine that boundary line has been assumed by this court, in a pending case between two states, and the attention of a state court is called to that fact, in a case in which is involved the location of the same boundary line, a federal question is presented, and the state court cannot act in disregard of the authority of this court, which is already invoked, or defeat the right of this court to determine such federal question for all purposes, by de-

aiding the state court case before the decision of this court in the pending case between the two states.

That being so, a federal question was necessarily raised in this case by the motion in the Supreme Court of Mississippi to continue this cause until the case then pending in this court to determine the boundary line between the States of Arkansas and Mississippi was decided, and the right of plaintiff in error to have that question determined by this court was denied by the overruling of its motion and by the decision of the Supreme Court affirming the decision of the Circuit Court.

The federal character of the question thus raised is shown by another consideration. The question of the boundary line between the two states in this case not only arises under federal statutes, but the boundary question can be finally and conclusively settled only by an action in which the states concerned are parties. This court is the only court having jurisdiction under the federal Constitution of controversies between states, and is the only court which can conclusively settle disputed boundary questions between states. When a suit, therefore, has been commenced in this court between two states to settle a boundary controversy, a proceeding has been instituted which will result in a judgment which will be conclusive of the question involved and will determine finally, not only the rights of the two states, but of all other parties. The settling of the boundary line in such a proceeding is not a mere private matter; it is a matter of public concern which involves the sovereign rights of states. It is not like the bringing of a suit between private parties, in which is involved a question similar to one involved in another suit already pending between other private parties. The decision in such private suit is binding only upon the parties before the court, but the decision of a boundary question by this

court between sovereign states settles the question once and for all for the states and for all persons. Private parties cannot thereafter litigate that question without regard to the decision of this court on the ground that they were not parties to the suit between the states. To all intents and purposes they are parties to the suit between the states and are bound by the judgment of this court in such a case, and all inferior courts must take judicial notice of such decision as constituting the law of the land.

We contend, therefore, that when the Mississippi Supreme Court, by the motion in this case, had notice of the pendency of the suit between the States of Arkansas and Mississippi (No. 6, Original) it had notice of a proceeding which, under the federal Constitution, would determine the boundary line question, not only as between the states, but between all parties, including the parties to this cause. To overrule that motion and affirm the judgment of the Circuit Court was to deny plaintiff in error a claimed federal right to have the boundary question involved in this case determined by this court under and in accordance with the Constitution and laws of the United States. We submit that the denial of this federal right clearly entitles plaintiff in error to the writ of error granted by this court.

3. *The boundary question between the two states was a federal question which was raised and decided both in the Mississippi Supreme Court and in the Circuit Court.*

Counsel for defendants in error contend that because the question of the boundary line in this case was determined as a question of fact by the jury in the trial court, there is no federal question in this case. (Brief, 15.) But obviously the existence of a federal question is determined, not by the way in which it was decided, but by

the fact that it was decided. The writ of error in this case is directed to the Supreme Court of Mississippi, and that court affirmed the judgment of the trial court with full knowledge of the federal questions involved and of the fact that the judgment thus affirmed determined that the land in question in this case was in the State of Mississippi and not in the State of Arkansas.

If the boundary question was a question which should be decided only by a court and not by a jury, the court to determine the question was *this* court. The Mississippi Supreme Court, therefore, should have left the question for the determination of this court (as was requested by plaintiff in error) instead of leaving it finally to the decision of a jury, under erroneous instructions, by affirming the judgment of the trial court before this court had decided this peculiarly federal question.

We submit, therefore, that the fact that a boundary line question between the States of Arkansas and Mississippi was decided in this cause necessarily involves a federal question which was properly raised and decided in the Supreme Court of Mississippi. The Supreme Court of Mississippi was informed that the boundary question was a federal question, and its affirmance of the judgment of the trial court with such knowledge was necessarily a decision of that federal question.

Furthermore, it is not true, as counsel contend, that "the case was fought out without reference to any federal question" in the trial court. (Brief, 18.) It is evident from the record and from the instructions to the jury that the trial court took judicial notice of the federal nature of the boundary line question. The instructions of the court, as we have shown, made the case turn on that question, and the boundary line between the states was necessarily a question arising under federal

statutes, which, as the court also knew, could be determined conclusively and finally only by a decision of this court. All parties, and the court also, knew that the question to be decided was a federal question and the instructions were based on that ground. The court was not only bound to, but did in fact, take judicial notice of the federal nature of the boundary line question.

"This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court." (*Kaukauna Co. v. Green Bay, etc., Canal*, 142 U. S., 254, 269.)

We submit, therefore, that a federal question was necessarily considered and decided, both by the trial court and by the Mississippi Supreme Court, and that the motion to dismiss or affirm in this case should be denied.

Respectfully submitted,

HERBERT POPE,

Attorney for Plaintiff in Error.

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MAR 1 1919

JAMES D. MAHER,
CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No. **171**

RUST LAND & LUMBER COMPANY,
Petitioner,

vs.

ED JACKSON, WILL SCOTT, J. F. NICHOLS, A. C.
COLEMAN, ZANDERS PARKER and ISOM
WHITE,
Respondents.

PETITION FOR CERTIORARI.

RUST LAND & LUMBER COMPANY,
By HERBERT POPE,
Counsel.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No.

RUST LAND & LUMBER COMPANY,
Petitioner,
vs.

ED JACKSON, WILL SCOTT, J. F. NICHOLS, A. C.
COLEMAN, ZANDERS PARKER and ISOM
WHITE,
Respondents.

PETITION FOR CERTIORARI.

*To the Honorable, the Judges of the Supreme Court of
the United States:*

Your petitioner, Rust Land & Lumber Company, a corporation organized under the laws of the State of Wisconsin, respectfully shows to this court that on March 12, 1917, this court, upon petition duly presented and filed by the petitioner, issued a writ of error to the Honorable Judges of the Supreme Court of Mississippi, commanding them to send to this court for review the record and proceedings, with all things concerning the same, in

a suit between your petitioner and Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isom White; that in compliance with said writ a duly certified copy of the record and proceedings in said cause was transmitted to and filed in this court; that said record has been printed and said cause is now pending in this court, and is known as No. 171 on the pending docket of this court; that question has been made of the jurisdiction of this court in said cause, upon the writ of error so issued by it, and your petitioner therefore presents and files this, its petition for *certiorari*, and respectfully asks that, in case said writ of error be dismissed by this court, this court grant to it the relief herein prayed, and that the transcript of the record in said cause, No. 171, be considered as filed as an exhibit to this petition, and in support of this petition your petitioner shows as follows:

1. Heretofore, and on or about the 15th day of March, 1913, an action of replevin was commenced in the Circuit Court, First District, for the County of Coahoma, State of Mississippi, by Ed. Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker and Isom White against your petitioner, Rust Land & Lumber Company, to recover certain timber, or the value thereof, alleged to have been wrongfully taken by your petitioner from the possession of the said respondents. To the declaration of the respondents your petitioner, Rust Land & Lumber Company, pleaded the general issue, and, upon the trial, the cause was submitted to a jury under the instructions of the court and the jury returned a verdict in favor of respondents in the sum of \$3,600 and judgment was entered in said Circuit Court in accordance with the verdict of the jury. The issue involved and submitted to the jury in said cause, under the instructions

of the court, involved the question of the location of the boundary line between the State of Mississippi and the State of Arkansas at a certain point on the Mississippi River known as Horse Shoe Bend, the respondents claiming that the land from which the timber in question in this suit was cut was in the State of Mississippi and your petitioner claiming that said lands were in the State of Arkansas.

2. Your petitioner, Rust Land & Lumber Company, appealed from the judgment of said Circuit Court to the Supreme Court of Mississippi. While the case was pending in said Supreme Court, and on or about the 6th day of March, 1916, your petitioner, Rust Land & Lumber Company, appellant in said cause then pending in the Supreme Court of Mississippi, moved the court to continue the cause and stay the trial thereof until a certain cause then pending in this court, known as *State of Arkansas v. State of Mississippi* on the docket of this Honorable Court, was determined. In support of said motion, your petitioner set forth that said cause between the State of Arkansas and the State of Mississippi involved the true boundary line between the said states at the very point in controversy in this cause then pending in the Supreme Court of Mississippi, and that a determination of the boundary line by this court would determine the boundary line between the said states and whether the land involved in this cause was in the State of Arkansas and belonged to your petitioner, or was in the State of Mississippi and belonged to the respondents. This motion was at first granted, but subsequently the respondents moved to set aside this order for a continuance upon the ground that the decision of this court in the case between the States of Arkansas and Mississippi would not be rendered upon the same testimony

which was produced in this cause, and that there was no way by which the judgment of this court in said case between the two states could be introduced in this cause then pending in the Supreme Court of Mississippi, and that the Supreme Court of Mississippi was in no way subject to the final jurisdiction of this court as to the question involved in said cause. This motion of the respondents was granted, the order for a continuance was set aside and the cause set for hearing at the October term of said Supreme Court of Mississippi, 1916. On December 23, 1916, the Supreme Court of Mississippi affirmed the judgment of the Circuit Court of Coahoma County. A petition for rehearing filed by your petitioner in said cause in the Supreme Court of Mississippi, calling the attention of said Supreme Court to the decision of this court in the case of *Cissna vs. State of Tennessee*, reported in 242 U. S., 195, was denied.

3. The judgment of the Circuit Court of Coahoma County in said cause was based upon a single issue which involved the boundary line between the States of Arkansas and Mississippi. This question was a federal question arising under certain acts of Congress admitting the States of Mississippi and Arkansas to the Union, as appeared in the bill in the case then pending in this court between the State of Arkansas and the State of Mississippi, which bill was filed by your petitioner with its motion in the Supreme Court of Mississippi. The judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court of Coahoma County was not and could not have been based on any ground which did not involve the decision of this federal question—the location of the boundary line between the two states—and this federal question was not decided in accordance with the rules established and applied by this

court in such cases. A federal question was also directly raised in the Supreme Court of Mississippi by the motions made by your petitioner and by the respondents with reference to the continuance of said cause pending the determination by this court of the case between the two states, and the decision of said court setting aside the order granting the continuance and the judgment of said court affirming the judgment of said Circuit Court were by the highest court in said state in which a decision could be had, and denied the title, right, privilege or immunity thus claimed by your petitioner under the constitution and the statutes of, and an authority exercised under, the United States.

4. Wherefore, your petitioner claims and says that by the final judgment in said cause in the highest court in the State of Mississippi in which a decision in said cause could be had, there was a right, title, privilege or immunity which was specially set up and claimed by your petitioner, under and by virtue of the constitution and statutes of and an authority exercised under the United States, and the decision of said court was against such right, title, privilege or immunity which was so specially set up and claimed by your petitioner.

And your petitioner respectfully prays that, in case said writ of error be dismissed by this court, a writ of *certiorari* be issued out of and under the seal of this court, directed to the Supreme Court of the State of Mississippi, directing it to stay all further proceedings in said cause between your petitioner and said respondents until the further order of this court; that the transcript of the record of the proceedings of said Supreme Court of Mississippi in said cause No. 171, now on file in this court, be considered and treated as filed with this petition, and that the printed record of the proceedings

in said cause No. 171, now on file in this court, be considered and treated as the printed record in this cause in this court, to the end that this cause may be reviewed and determined by this court. Your petitioner further prays for an allowance of a citation and *supersedeas* in due form of law and that execution upon said judgment of the Supreme Court of Mississippi and the levy of such execution may be stayed until the further order of this court; that the judgment of said Supreme Court of Mississippi be reversed, and that your petitioner may have such other and further relief in the premises as may be just. And your petitioner will ever pray, etc.

RUST LAND & LUMBER COMPANY,

By HERBERT POPE,
Counsel.

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FILED
MAR 1 1919
JAMES D. MAHER,
CLERK.

No. **171**

IN THE
Supreme Court of the United States
OCTOBER TERM, 1918.

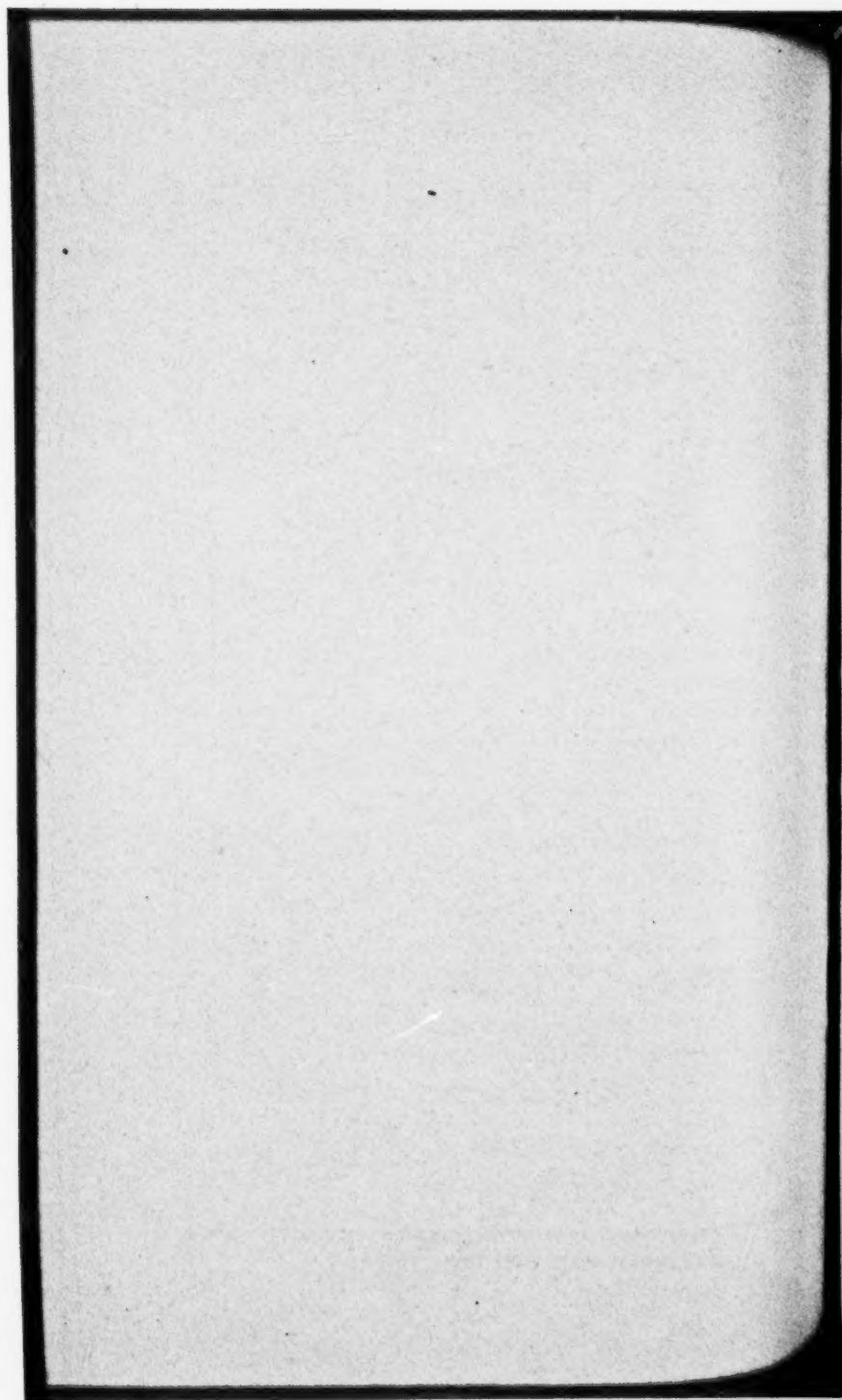
RUST LAND & LUMBER COMPANY,
PETITIONER.

v.

ED JACKSON ET AL,
RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO
MOTION TO GRANT WRIT OF CERTIORARI,
AND ON PLEA THERETO.

GERALD FITZGERALD
GEORGE F. MAYNARD
MARCELLUS GREEN
GARNER W. GREEN
Attorneys for Respondents.



IN THE
Supreme Court of the United States

RUST LAND AND LUMBER COMPANY

Petitioner

V.

ED JACKSON, ET AL

Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF
CERTIORARI

POINT I.

The writ is barred by the lapse of time.

POINT II.

The judgment in the Supreme Court of Mississippi was against the Rust Land and Lumber Company, and the surety on its appeal bond, and the surety on a forthcoming bond against whom judgment was rendered in the circuit court, neither of whom are brought before this court by this petition.

POINT III.

Petitioners, Rust Land and Lumber Company, have no title below high water mark in Arkansas, under its settled law.

POINT IV.

The bed of all streams in Arkansas is held by the State in trust for the inhabitants; so that there could be no acquisition, thereof by petitioner.

POINT V.

After an avulsion, no title arises through accretions in the bed of the river which dries up.

POINT VI.

No Federal question decided, or if decided then it was decided in accordance with the law.

POINT VII.

Material difference upon the facts.

POINT I.

The writ is barred by the lapse of time.

The question of how to properly raise the question of prescription is here involved, and while in *Brooks v. Norris*, 11 How., 203, it was said by Chief Justice Taney:

“In this case, therefore, five years had elapsed before writ of error was brought, and the limitation of it in the Act of Congress was a bar to the writ. According to the English practice, the defendant in error must avail himself of this defense by plea. He cannot take advantage of it by motion; nor can the Court judicially take notice of it, as the limitation of time is not an objection to the jurisdiction of the Court. It is a defense which the defendant in error may or may not rely upon, as he himself thinks proper. But according to the established practice of this court, he need not plead it, but may take advantage of it by motion. The forms of proceeding in English Courts of Error have never been adopted or followed in this Court; and either party, without any formal assignment of error or plea, may avail himself of objection which appears upon the record itself. In this case the bar arising from lapse of time is apparent on the record, and the defendant may take advantage of it by motion to quash or dismiss the writ.”

The respondents in this case have, out of abundance of caution filed formal plea under the rule as laid down in 2 R. C. L., 206, following *Peterson v. Manhattan Life Insurance Co.* Ill. Sup. Ct., Feby. 16, 1910,, 244 Ill., 329, and, in addition, have made a formal motion for dismissal on the same ground, in order to prevent any question of practice from thwarting their manifest right to relief.

By Section 6 of the Amendatory Act of September 6, 1916, 39 Statutes at Large, 727, it is said:

“That no writ of error, appeal, or writ of certiorari, intending to bring up any cause for review by the Supreme Court, shall be allowed or entertained, unless duly

applied for within three months after entry of judgment or decree complained of: provided, that writs of certiorari addressed to the Supreme Court of the Phillipine Islands may be granted, if application therefor be made within six months."

This statute is mandatory and, as held in *Ayres v. Tolsdorfer*, 187 U. S. 595,

"Apparently apprehending this result, Plaintiff in Error applied at the hearing, on motion and petition filed October 9th, 1902, for the writ of certiorari, as under Section 6 of the Act of March 3, 1891. Judgment was entered below December 7, 1900, and petition for rehearing denied February 23, 1901. This writ of error was brought April 15, 1901, and the record filed here and the cause docketed April 29, 1901. Under these circumstances, we must decline to entertain the application. Motion for certiorari denied. Writ of Error dismissed."

Again, in *Bonnie v. Gulf Company*, 198 U. S., 118, Chief Justice Fuller said:

"The judgment was entered in the Circuit Court of Appeals May 27, 1902; this writ of error was allowed May 22, 1903; and the case was docketed here June 1, 1903. Plaintiff in error filed a petition for certiorari herein Feby 17, 1905, which was submitted February 27, and its consideration postponed to the hearing on the merits. It is our opinion that the writ should not be granted. *Ayres v. Tolsdorfer*, 187 U. S., 595; writ of error dismissed; certiorari denied."

As said in 3rd C. J., 343:

"But if it is questionable whether a case should be brought up by appeal or writ of error, the case may, according to a practice sanctioned by the Federal courts and some of the State courts, be brought up by both methods, and the appellate court, when it comes to examine the case, will determine whether it is properly brought up by appeal or writ of error."

Quoting to approve, a declaration of Judge Sanborn in *Lockman v. Long*, 132 Fed. 1,

“The practice of taking an appeal and a writ of error to review the same adjudication is not only permissible, but commendable in cases in which counsel have just reason to doubt which is the proper proceeding to give jurisdiction to the appellate court. In such cases the reviewing court will consider both proceedings, will dismiss that one which is ineffective and will review the ruling of the court below in accordance with the rules of the method applicable to the nature of the case before it.”

But as said again in the same authority, 3rd C. J., 1046, “After an appeal or proceeding, when error has been dismissed, either voluntarily for having been taken prematurely or for defects, or want of prosecution, a second appeal may be taken if perfected within the time fixed by statute, but not otherwise.”

This authority then cites therefor the following cases where the rule was applied:

Moon v. VanCuren, 49 Ind. Rep. 201:

“An examination of the records of this court show that two appeals have been taken in this case; that both of them were dismissed for failure to file briefs; that leave was granted both times to withdraw the record; and that the case has not been reinstated. These facts constitute no avoidance of the plea. It is expressly provided that no appeal shall be taken after three years. The statute commences to run from the time the final judgment is rendered, and the transcript must be filed in the office of the Clerk of this court within three years from the rendition of the judgment. The judgment was rendered on the 11th day of January, 1871, and the transcript was filed in this court on the 30th day of April, 1874. This was too late. We have no jurisdiction of the case. The reservation was only intended to prevent the dismissal from appealing as a bar to a second appeal, if the time prescribed by statute had not expired.”

State Bank v. Morris, 13 Eng. Rep. 292, holds:

“Chief Justice Watkins delivered the opinion of the court. In this case, Alexander Robinson, one of the defendants, has pleaded, in bar of the proceedings on the writ of error, that more than three years elapsed from the rendition of the judgment in his favor, and before suing out of this writ of error to reverse the same. The plaintiff has replied, in effect, that she sued out and prosecuted a writ of error to the judgment in question, within three years from its rendition; that such writ of error was quashed by this court, and that within a year from the judgment of quashal, this writ of error was sued out, and is now prosecuted. The defendant demurs to the replication. By statute, title “Practice in Supreme Court,” Secs. 2 and 3, the limitation to writs of error is three years, with a saving in favor of minors, married women, persons of unsound mind, imprisoned or absent from the United States. There is no other saving or exception, by virtue of which the avoidance, sought to be set up in the replication, can be admitted. The statute which creates the limitation must also create the exception. We know of no rule of law or decision to the contrary. We are called upon by the replication to allow an exception by analogy to that contained in the general statute for the limitation of actions, when the statute itself does not extend to any action otherwise limited by any statute. Revised Statute, title “Limitation”, Sec. 31.

In *People v. Turner*, 20 Cal. Reports, 142, it is held:

“When the appeal in this case was dismissed at the October term, it was without prejudice to a second appeal. (19 Cal. 81) This reservation was not intended to give any right of which the statute had deprived the appellant. The Court could not enlarge the time for appealing. The reservation was only intended to prevent the dismissal from operating as a bar to a second appeal, if the time prescribed by statute had not expired.”

In *Hewitt v. Colo. Springs Co.*, 5 Colo. Rep. 184, it is held:

“Whatever effect, therefore, a legally perfected appeal, pending at the date of the passage of the act, might have to take a case, without the rule laid down in *Willoughby v. George*, 1st cited, the attempted appeal in this case can have no such result. The steps taken were without authority of law, and had no effect on this appeal. The bar attached to the expiration of the 90 days, and under the constitutional provision referred to it cannot be disturbed by retrospective legislation.”

Chief Justice Fuller approved this practice in *Kennady v. sinot*, 179 U. S., 612. *Sugar Co. v. Philippines* 247 U. S., 389.

In *Gonppers v. U. S.*, 233 U. S., 604, there was an appeal, writ of error and petition for certiorari. The appeal and writ of error were dismissed and writ of certiorari granted and the judgment below reversed.

This court, had it so minded, and had the Rust Land & Lumber Company brought both certiorari and writ of error, determined this cause on the merits, without reference to form of remedy; but the Rust Land and Lumber Co. did not see fit to bring a certiorari until after two years after the rendition of the final judgment, and by the statute in that case, prescription will run. A writ of error is not amendable. If it is defective under the unanimous rulings, another writ of error may be obtained, and there is no reason for a different rule in a case of writ of error and a certiorari; but the time has elapsed and this writ therefore is not allowable.

POINT II.

The judgment in the Supreme Court of Mississippi was against the Rust Land and Lumber Company, and the surety on its appeal bond, and the surety on a forthcoming bond against whom Judgment was rendered in the circuit court, neither of whom are brought before this court by this petition.

These defects are discussed at length on the motion to dismiss or affirm and we merely make reference to them as good

and sufficient reasons why this writ of certiorari cannot be granted.

POINT III.

Petitioners, Rust Land and Lumber Company, have no title below high water mark in Arkansas, under its settled law.

This proposition is discussed at length in the companion case on the merits, and we but make reference to the brief therein for exposition of the law as contended for by us therein.

POINT IV.

The bed of all streams in Arkansas is held by the State in trust for the inhabitants; so that there could be no acquisition thereof by petitioner.

The law upon this point, as contended for by us, is collated in the principal brief, and to save prolixity, reference is made thereto.

POINT V.

After an avulsion, no title arises through accretions in the bed of the river which dries up.

This point has been fully covered in the original brief, and reference is thereunto made.

POINT VI.

No Federal question decided, or if decided then it was decided in accordance with the law.

The law upon this point, as contended for by us, has been fully discussed in our motion to dismiss or affirm, and the several briefs filed therein, reference to which is hereby made and not here inserted, to save prolixity.

POINT VII.

Material difference upon the facts.

With greatest deference, we differ materially with learned counsel for appellant, upon the facts as found by the Court in this case, and as the same appear of record; and we therefore refer the court to our briefs upon the facts in the case submitted upon the merits, where our contentions are set forth at length.

Wherefore, we respectfully submit that the petition for writ of error is barred and should be denied.

GERALD FITZ GERALD,
GEO. F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Respondents Named.

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FILED

MAR 1 1919

JAMES D. MAHER,
CLERK.

No. **171**

IN THE
Supreme Court of the United States

OCTOBER TERM, 1918.

RUST LAND & LUMBER COMPANY,
PETITIONER.

v.

ED JACKSON ET AL,
RESPONDENTS.

MOTION TO DISMISS PETITION FOR WRIT
OF CERTIORARI.

GERALD FITZGERALD
GEORGE F. MAYNARD
MARCELLUS GREEN
GARNER W. GREEN

Attorneys for Respondents.

IN THE
Supreme Court of the United States

RUST LAND AND LUMBER COMPANY

Petitioner.

V.

ED JACKSON, ET AL

Respondents.

IN RE: PETITION FOR CERTIORARI.

Now come the respondents hereby by Attorney and move the Court to dismiss the petition for certiorari, because:

(1). Said petition was not filed until February, 19th, 1919, when final judgment sought to be reviewed was rendered in January, 1917, more than two years previous and the same is barred and prescribed.

(2). The judgment in the Supreme Court of Mississippi was against the Rust Land and Lumber Company and the surety on its appeal bond, the United Casualty & Surety Co., and the surety on a forthcoming bond, against whom judgment was rendered in the circuit court was the United States Fidelity & Guaranty Co, neither of which is brought before this court by this petition.

(3.) Petitioners, Rust Land and Lumber Company, have no title below high water mark, in Arkansas, under its settled law.

(4.) The bed of all streams in Arkansas is held by the State in trust, for the inhabitants; so that there could be no acquisition thereof by petitioner.

(5.) After an avulsion, no title arises through accretions in the bed of the river which dries up.

(6.) No Federal question decided, and if decided then in accordance with the law.

(7). AND FOR OTHER REASONS APPARENT.

Respectfully,

GERALD FITZGERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN.

For Respondents Named.

IN THE SUPREME COURT OF THE UNITED STATES.

RUST LAND AND LUMBER COMPANY

Petitioner.

V.

No. 171.

ED JACKSON, et al.

Respondents.

TO THE HON. HERBERT POPE, CHICAGO, ILLINOIS:

Attorney for Petitioner,

Rust Land & Lumber Company:

PLEASE TAKE NOTICE that in answer to your motion, on March 3rd, 1919, these Respondents will make motion to dismiss said Petition for the reasons above shown.

Attorneys for Respondents in Error.

State of Mississippi,
County of Hinds
City of Jackson,

I, Garner W. Green, being first duly sworn, on oath states, that I am a member of the bar of the Supreme Court of the United States and that I have this day mailed by registered mail to Herbert Pope, Chicago, Illinois, attorney for said Plaintiff in Error in said above entitled cause, a true copy of this notice, together with a copy of the plea in bar to the petition for certiorari.

Subscribed and sworn to before me
this -----day of February, A. D. 1919.

Notary Public.

My Commission expires-----



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Office Supreme Court, U. S.
FILED

MAR 1 1919

JAMES D. MAHER,
CLERK.

No. 171

IN THE
Supreme Court of the United States

OCTOBER TERM 1918.

RUST LAND AND LUMBER COMPANY,
Petitioner

v.

ED JACKSON ET AL.,
Respondents

PLEA IN BAR OF THE STATUTE OF LIMITATIONS TO
THE PETITION FOR A WRIT OF CERTIORARI

GERALD FITZGERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Respondents.

IN THE
Supreme Court of the United States

RUST LAND AND LUMBER COMPANY

Petitioner.

V.

ED JACKSON, ET AL

Respondents.

IN RE: PETITION FOR CERTIORARI. PLEA IN BAR

Now comes Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker, and Isom White, by their attorneys, and entering herein specially their appearance, for the purpose of filing this plea, say:—

That the final judgment in the above styled cause was rendered in the Circuit Court of Coahoma County, Mississippi upon -----day of December, 1913; and the final judgment affirming said judgment of the Circuit Court of Coahoma County, State of Mississippi, was rendered in the Supreme Court of the State of Mississippi upon the 8th day of January, 1917, as will more fully appear by the record herein, reference whereto is hereby made and the same prayed to be taken as part of this plea for the purposes of prescription, and that said petition filed herein by said Rust Land & Lumber Company, petitioner, against these respondents, was not presented to this court until the ----- day of February, 1919, more than two years after the entry of the final judgment by said Supreme Court and that these respondents now say that said writ of certiorari is barred and prescribed by the lapse of time under the statute in that behalf made and provided, and this they are ready to prove by the record aforesaid.

GERALD FITZGERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN.

Attorneys for Respondents Named.

STATE OF MISSISSIPPI
COUNTY OF HINDS
CITY OF JACKSON

Personally appeared before me the undersigned authority, the within named Garner W. Green, who being by me first duly sworn, on oath says, that he is one of the attorneys for the respondents in the above styled cause, and that the matters and things in the foregoing petition stated are true and correct as therein set forth, and that he is duly authorized to make this affidavit for and on behalf of said respondents, and that a copy of this plea was sent postpaid to the Hon. Herbert Pope, attorney for petitioner, Monadnock Block, Chicago, Illinois, upon the 22nd day of February, 1919.

Sworn to and subscribed before me this the

-----day of February, 1919.

15
DEC 14 1918

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No. 171

RUST LAND & LUMBER COMPANY,
Plaintiff in Error,
vs.

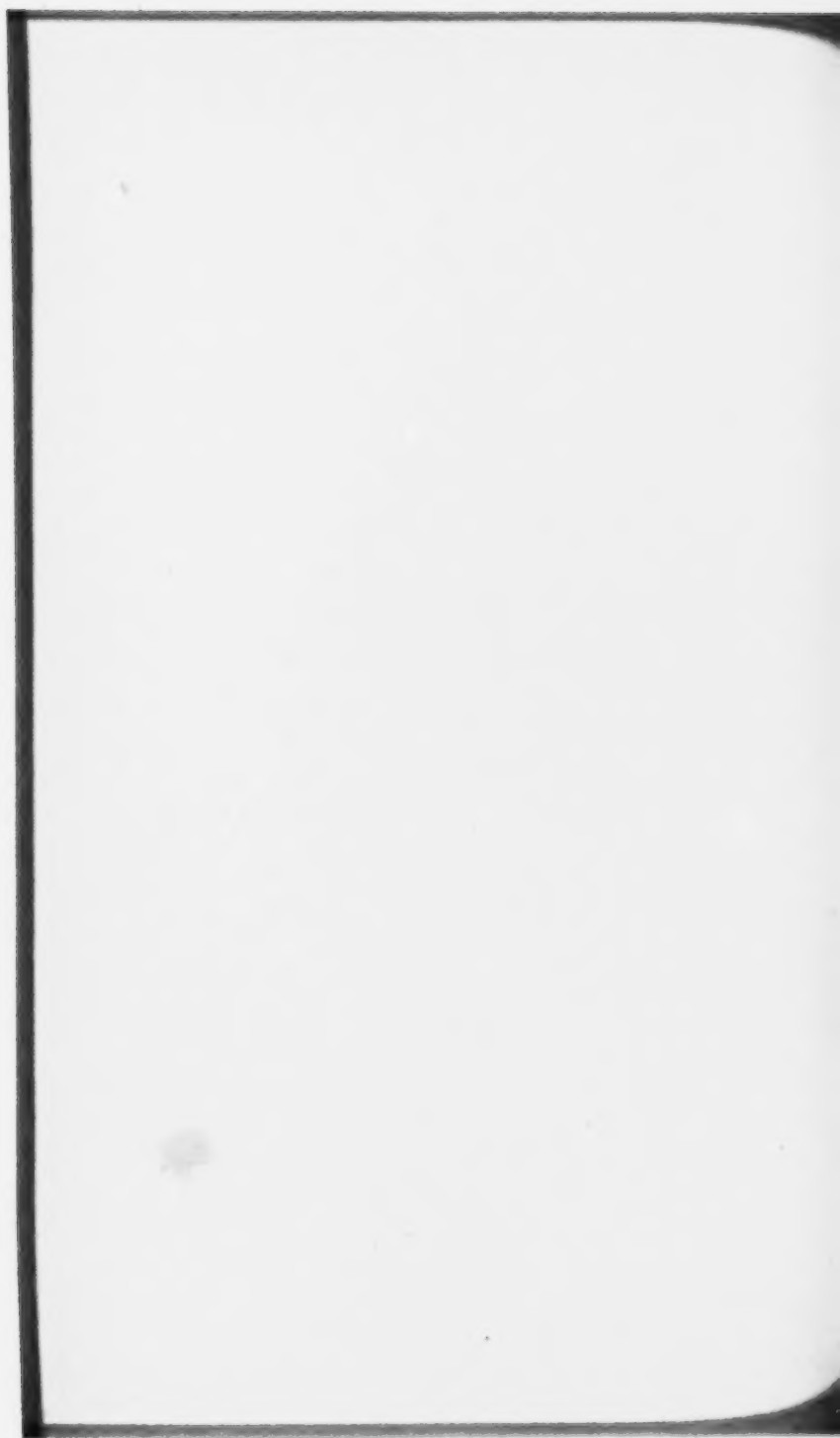
ED. JACKSON *et al.*,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

HERBERT POPE,
Attorney for Plaintiff in Error.

ALBERT M. KALES,
Of Counsel.



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BRIEF AND ARGUMENT FOR PLAINTIFF IN
ERROR.

STATEMENT.

This is a replevin suit brought in the Circuit Court of Coahoma County, Mississippi, by defendants in error to recover timber alleged to have been taken by plaintiff in error from their possession. There was a verdict and judgment for defendants in error in the Circuit Court (Rec., 164), and the judgment was affirmed by the Supreme Court of Mississippi without an opinion. (Rec., 171.) The judgment in the Circuit Court of Coahoma County was based, as plaintiff in error contends, upon a

single issue which involved necessarily the location of the boundary line between the States of Arkansas and Mississippi.

In 1848 the main navigable channel of the Mississippi River was changed by an avulsion which cut across the points of a horseshoe-shaped channel formed by the old course of the river and which left an island known as "Horseshoe Island" between the old and new channels. The plaintiff in error contends that the main navigable channel of the Mississippi River, before the avulsion of 1848, flowed through the channel which is still known as Old River or Horseshoe Lake, while defendants in error have attempted to show that the channel at that time corresponded with a smaller body of water farther north, known as Dustin Pond (Rec., 28-29), or that it was impossible to tell where the channel then was (Rec., 81), and have always claimed, and still do, in their briefs in this court, that the boundary line between the two states is a line equally distant from the two banks of the Mississippi River as they were located before the cut-off in 1848.

The issue raised at the trial can best be understood by reference to the map entitled: "Horseshoe Island and Accretions, Phillips County, Arkansas," appearing among the exhibits. (Rec., 287; the third map from the end of the exhibits.) The land in question lies between the horseshoe-shaped body of water marked "Dustin Pond" on the map and the larger horseshoe-shaped body of water marked "Old River" or "Horseshoe Lake," also called "Pecan Lake," and south and west of the section marked "22" on the map. (See map, Rec., 286.)

It is conceded on this record that title to Lots 1 to 9, inclusive, of Section 11, Township 28, Range 5, West, in the County of Coahoma and State of Mississippi (shown

at lower left-hand corner of map) is vested in certain persons from whom defendants in error claimed authority to cut the timber in question; that title to Section 22 and Section 23, Township 4 South, Range 4 East, Phillips County, Arkansas, is vested in plaintiff in error (Rec., 23), and, under the instructions to the jury, plaintiff in error is entitled to the accretions in Arkansas to such sections. (Rec., 161.)

It appears from the instructions given for defendants in error and plaintiff in error (Rec., 160-161) that the case was left to the jury upon the single issue of whether the land in question was in the State of Arkansas or the State of Mississippi. Defendants in error made no motion for a new trial and preserved no objections to any of the instructions given. It thus appears from the record that if the land in question is in Arkansas it belongs to plaintiff in error as accretions to Sections 22 and 23.

The following instructions in particular show that the case was left to the jury on the issue of whether the land in question was in the State of Arkansas or the State of Mississippi (Rec., 160-161):

"The court instructs the jury that they can in no event find that the lands from which the timber in controversy was cut are accretions to the Arkansas shore unless the defendant has satisfied them by a preponderance of the evidence that the said land lies north and east of what was the thread of the stream or channel of the Mississippi River at the time of the cut-off in 1848, even though they believe from the evidence that the said tract of land is now connected with the Arkansas lands.

The court instructs the jury that unless the Rust Land Company has shown to the satisfaction of the jury by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company in the State of Arkansas, or was north and east of a channel of the Mississippi

River where the cut-off 1848 occurred, then they will find for the plaintiffs.

The court instructs the jury for the defendant that if they believe from the evidence that the body of water shown on the maps introduced in evidence in this case, and called Old River or Pecan Lake is between the Mississippi shore and the land on which the timber in controversy in this suit was growing, and that this body of water was the last channel of the river as it dried up between the island and the shore of Mississippi, and that the said lands on which the said timber was growing, is not attached to the Mississippi shore or any accretions formed or attached thereto, then the jury will find for the defendant."

The instructions also directed the jury without qualification that the burden of proving that the land in question was in Arkansas was upon plaintiff in error. This appears from the first two instructions above quoted.

There was a judgment for defendants in error; a new trial was denied plaintiff in error, and an appeal was taken to the Supreme Court of Mississippi. (Rec., 164-166.)

On March 6, 1916, while this cause was pending on appeal in the Supreme Court of Mississippi, plaintiff in error filed a motion calling attention to the fact that there was then pending in this court an original suit between the State of Arkansas and the State of Mississippi to determine the location of the boundary line between the two states at the same point at which such boundary line is involved in this cause, and asking that this cause be continued until the determination by this court of the boundary line in question in the case between the states. (Rec., 178.) This motion was granted (Rec., 178), but subsequently defendants in error moved to set aside this order for a continuance upon the following grounds (Rec., 179):

"1. The decision of the Supreme Court of the United States will not be controlling in this case, as it may not be rendered, and will not be rendered, upon the same testimony produced in the same way, and the rights of the parties in this particular case are to be determined by the record as made and not by what may be developed at another time and under different circumstances.

2. There is no way known to the law by which said judgment in the Supreme Court of the United States can be in any way introduced into this court which is only a court of errors and appeals without any original jurisdiction, and its sole right in the premises is to affirm or reverse any decision made by the Circuit Court in accordance with whether or not said Circuit Court, upon the evidence before it, reached the correct conclusion.

3. Because this court is not in any way subject to the final jurisdiction of the Supreme Court of the United States, but on the contrary, as to the question herein involved, that is to say, the rights of the parties to the timber growing in what was formerly the Mississippi River, the Supreme Court of the United States follows the decisions of the states and does not overrule them."

This motion was granted; the order for a continuance was set aside and the cause set for hearing at the October term, 1916. (Rec., 180.) On December 23, 1916, the Supreme Court of Mississippi affirmed the judgment of the Circuit Court without an opinion. (Rec., 171.) A motion for rehearing was filed, and plaintiff in error also asked for an opinion, so that it might appear that a federal question was raised by reason of the fact that the case involved the determination of the boundary line between the two states. (Rec., 171-177.) Both motions were denied. (Rec., 179.)

A petition for writ of error was then presented to this court (Rec., 181-186), and this cause is now pending on writ of error issued on such petition. (Rec., 191-192.)

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that the judgment of said Circuit Court involved a federal question—the location of the boundary line between the States of Arkansas and Mississippi—and such federal question was erroneously determined.

II.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that the location of the boundary line between Arkansas and Mississippi was not determined by said court by ascertaining the middle of the main navigable channel of the Mississippi River prior to the avulsion in 1848, but was erroneously determined without reference to that fact.

III.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that there was drawn in question in said Circuit Court the location of the boundary line between the State of Arkansas and the

State of Mississippi, and the judgment of said Circuit Court erroneously determined that said boundary line was so located that the land in controversy in this cause is situated in the State of Mississippi and not in the State of Arkansas.

IV.

The Supreme Court of Mississippi erred in granting the motion of the defendants in error to set aside the order theretofore entered to continue said cause, as requested by plaintiff in error, until this court decided the case of *State of Arkansas v. State of Mississippi*, then pending in this court, which case involves the determination by this court of the true boundary line between said states at the point at which said boundary line is drawn in question in this cause.

V.

The Supreme Court of Mississippi erred in granting the motion of defendants in error to set aside the order theretofore entered continuing said cause, and in refusing to continue said cause as requested by plaintiff in error until the decision by this court of the case of *State of Arkansas v. State of Mississippi* then pending in this court, in this: that the validity of an authority exercised under the United States was thereby drawn in question and the decision of said Supreme Court of Mississippi was against the validity of such authority.

VI.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that said Circuit Court erred in instructing the jury as follows (Rec., 160):

"The court instructs the jury that they can in no event find that the lands from which the timber in controversy was cut are accretions to the Arkansas shore unless the defendant has satisfied them by a preponderance of the evidence that the said land lies north and east of what was the thread of the stream or channel of the Mississippi River at the time of the cut-off in 1848, even though they believe from the evidence that the said tract of land is now connected with the Arkansas lands."

"The court instructs the jury that unless the Rust Land Company has shown to the satisfaction of the jury, by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company in the State of Arkansas, or was north and east of a channel of the Mississippi River where the cut-off 1848 occurred, then they will find for the plaintiffs."

VII.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court inasmuch as said Circuit Court erred in instructing the jury as follows (Rec., 160):

"The court instructs the jury that should they find from the evidence that the plaintiffs cut the timber in controversy in good faith by authority of King and Anderson, Charles McGhee, Ellen Anderson, who bona fide claimed the lands as accretions

to sectional, T. 28, Range 5 West, in Coahoma County, Mississippi, and the defendant by force or intimidation took the timber away from them, then the plaintiffs have made out a *prima facie* case and it devolves upon the defendant to show, by a preponderance of the evidence that it is the owner of the land from which the timber was cut before defendant can recover in this case."

VIII.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that said Circuit Court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows (Rec., 162-163):

"The court instructs the jury to find for the defendant.

The court further instructs the jury for the defendant that in considering and determining the question as to whether or not the land from which the timber in controversy in this cause was cut the jury may consider and should consider, in connection with all of the facts and circumstances in this case, the following facts, if in proof, to wit:

1. The opinions of the surveyors and civil engineers who have surveyed and examined the lands in question, and who are competent, to give such opinions with reference to the nature of the formation of the said lands.

2. The fact, if in proof, that a body of water three hundred yards wide divides it from the shore of Mississippi, or the original bank of the Mississippi River on the Mississippi side as it existed at the time of the cut-off of 1848 as made by the river at Horseshoe Lake.

3. The fact, if the jury believe from the evidence that it is a fact, that this body of water is deeper on the Mississippi side than on the Arkansas side, that the deepest water extends from a short dis-

tance north of the old Mississippi shore about one-third of the way across the lake or Old River, and from there north the remaining two-thirds of the way continues to grow more shallow until it reaches, at a very shallow depth, the sloping northern bank with very little bank to show.

4. The fact, if in proof, that the timber on the accretions between the said Horseshoe Island and the land where the timber was cut grows perceptibly smaller the further from the island towards the south that it is examined and that the timber is of later growth if the jury believe from the evidence that it is, on the land from which the timber in controversy was cut then it is on the land further north and northeast in the direction of the island.

5. The fact, if in proof, that the lands from which the timber in controversy in this suit was cut, is attached to and part of the accretions coming down from the island to it, and is at no point attached to or connected with the Mississippi shore or any accretion thereto; all these facts and circumstances, if the jury believe them to be true from the evidence, together with all other facts and circumstances in this case, the jury may consider in determining the question now before them, as to whether the lands from which the timber in controversy was cut is as an accretion a part of the lands of the defendant, and if from these facts and circumstances, and all of the other facts and circumstances in proof in this case the jury believe that the lands from which the timber in controversy in this suit was cut is a part of the accretions to the lands of the defendant, then the jury will find for the defendant."

IX.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this; that said Circuit Court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows (Rec., 163):

"The court further instructs the jury for the defendant that the plaintiffs in this case can in no event recover in this case for the timber in controversy unless the proof shows by a preponderance of the evidence that the timber was cut growing on the lands belonging to the grantors of these plaintiffs, or some of them, and even though the jury should believe from the evidence that there were two bodies of water between Horseshoe Island and the Mississippi shore which should be properly denominated Old River, that is to say, Dustin Pond and Pecan Lake, and that the land on which the timber was growing was between those two, still the plaintiff could not recover in this case unless the evidence affirmatively shows by a clear preponderance thereof, that the said land is an accretion to the Mississippi shore, belonging to the grantors of this plaintiff."

X.

The Supreme Court of Mississippi erred in failing and refusing to hold that the judgment of said Circuit Court of Coahoma County was contrary to the evidence in the record in this cause.

XI.

The Supreme Court of Mississippi erred in failing to reverse the judgment of the Circuit Court of Coahoma County on the ground that said Circuit Court erred in not directing a verdict for plaintiff in error, on the ground that, under the evidence in this cause, the land in question was situated in the State of Arkansas and not in the State of Mississippi.

XII.

The Supreme Court of Mississippi erred in denying the title, right, privilege or immunity specially set up and claimed by plaintiff in error under and in accordance with the true boundary line between the States of Arkansas and Mississippi as fixed and determined by the statutes and authority of the United States.

XIII.

The Supreme Court of Mississippi erred in affirming the judgment of the Circuit Court of Coahoma County.

BRIEF OF ARGUMENT.

I.

THIS COURT HAS JURISDICTION OF THIS CAUSE.

1. THE JUDGMENT OF THE SUPREME COURT OF MISSISSIPPI INVOLVED THE DETERMINATION OF A FEDERAL QUESTION—THE LOCATION OF THE BOUNDARY LINE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI.

The Supreme Court of Mississippi affirmed the judgment of the Circuit Court without an opinion. (Rec., 171.)

(1) The judgment of the Circuit Court was based upon a single issue which involved the boundary line between the states.

All other questions were eliminated by the instructions to the jury. (Rec., 160-161.)

(2) The judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court could not have been based on any ground which did not involve the federal question of the boundary line.

(a) The burden of proof related only to the issue involving the boundary line. (Rec., 160.)

(b) No question as to adverse possession was submitted to the jury or preserved on the record. (Rec., 160-161.)

(c) Similar instructions were not asked or given for both parties as to the boundary line or as to the burden of proof. (Rec., 160-161.)

(d) Under the instructions, if the land in controversy was in Arkansas it belonged to plaintiff in error and not to the state. (Rec., 161.)

2. A FEDERAL QUESTION WAS DIRECTLY RAISED IN THE SUPREME COURT OF MISSISSIPPI BY THE MOTIONS MADE BY BOTH PARTIES WITH REFERENCE TO THE CONTINUANCE OF THIS CAUSE PENDING THE DETERMINATION BY THIS COURT OF THE CASE BETWEEN THE TWO STATES.

The validity of an authority exercised under the United States was directly drawn in question and the decision was against its validity. (Rec., 178, 179, 180.)

Ireland v. Woods, 246 U. S., 323, 328.

The decision also denied a title, right, privilege or immunity under the statutes and authority of the United States as claimed by plaintiff in error.

See:

Cissna v. Tennessee, 246 U. S., 289, 293.

Kaukauna Co. v. Green Bay Canal, 142 U. S., 254.

3. THIS CAUSE IS REVIEWABLE BY THIS COURT ON WRIT OF ERROR.

(1) *There was drawn in question in this case the validity of an authority exercised under the United States, and the decision of the Supreme Court of Mississippi was against the validity of such authority, and this cause is therefore reviewable by this court on writ of error.*

The motion of defendants in error to set aside the order continuing the cause was expressly based upon the ground that the decision of this court in the pending case between the two states could have no effect upon the decision in this cause (Rec., 179), and thus directly drew in question the existence of an authority claimed to be exercised by this court, and the decision was against its existence or validity. (Rec., 180.)

Ireland v. Woods, *supra*.

The jurisdiction of this court is invoked upon this ground by the assignments of error. (Rec., 187-188.)

(2) *As the petition for writ of error in this case was filed in this court, this court is authorized, under Section 237 of the Judicial Code, to review this cause in any event.*

4. NONE OF THE SURETY COMPANIES MENTIONED IN THE RECORD IS A NECESSARY PARTY TO THE WRIT OF ERROR.

See brief for plaintiff in error on motion to dismiss (pp. 13-23).

(1) The United States Fidelity and Guaranty Company, surety on the replevin bond in the Circuit Court of Coahoma County, was not a party to the appeal to the Supreme Court of Mississippi, and the judgment of that court necessarily held that it was not a necessary party. It cannot, therefore, be a necessary party to the writ of error from this court to the Supreme Court of Mississippi.

(2) No judgment appears in the record against the United Casualty and Surety Company, the surety on the appeal bond in the Mississippi Supreme Court (Rec., 166), and the United States Casualty Company, mentioned in the judgment (Rec., 171), is not a party to the record in any capacity, and the judgment is a nullity as to it.

II.

THE LOCATION OF THE BOUNDARY LINE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI,—A FEDERAL QUESTION—WAS NOT DETERMINED BY THE CIRCUIT COURT IN ACCORDANCE WITH THE RULES ESTABLISHED AND APPLIED BY THIS COURT IN SUCH CASES, AND THE SUPREME COURT OF MISSISSIPPI, THEREFORE, ERRED IN AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT.

1. THAT THIS FEDERAL QUESTION WAS ERRONEOUSLY DECIDED BY THE MISSISSIPPI COURTS IS SETTLED BY THE DECISION OF THIS COURT IN *CISSNA V. TENNESSEE*, SUPRA.
2. THE CIRCUIT COURT OF COAHOMA COUNTY ERRED IN HOLDING THAT THE BURDEN OF PROOF IN THIS CASE WAS UPON PLAINTIFF IN ERROR TO PROVE THAT THE LAND IN CONTROVERSY WAS IN ARKANSAS AND NOT IN MISSISSIPPI.

The burden of proof related only to the issue of the boundary line and involved the federal question. (Rec., 160.)

3. THE SUPREME COURT OF MISSISSIPPI ERRED IN NOT REVERSING THE JUDGMENT OF THE CIRCUIT COURT, ON THE GROUND THAT A VERDICT SHOULD HAVE BEEN DIRECTED FOR PLAINTIFF IN ERROR.

If the rules established by this court in determining boundary lines are applied to the facts appearing in this record, it must be held that the Circuit Court erred in not directing a verdict for plaintiff in error. Any other decision would be an erroneous decision of this federal question.

III.

THE SUPREME COURT OF MISSISSIPPI ERRED IN SETTING ASIDE THE ORDER CONTINUING THIS CAUSE AND IN AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT BEFORE THE DECISION OF THIS COURT IN THE PENDING CASE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI.

Courts take judicial notice of location of boundary line as a fact by duly authorized body.

Bluefield Waterworks & Imp. Co. v. Sanders, 63 Fed., 333.

Decision of Mississippi Supreme Court was, therefore, erroneous.

After duly authorized tribunal has jurisdiction of cause to determine as a public or political fact boundary line between states or political subdivisions, the jurisdiction of other tribunals is superseded.

Supreme Court of Mississippi, therefore, erred in affirming judgment of Circuit Court while case between two states was pending and undetermined.

See Argument, *infra*.

ARGUMENT.

I.

THIS COURT HAS JURISDICTION OF THIS CAUSE.

We contend that federal questions are involved in this suit.

In the first place, the judgment of the Circuit Court of Coahoma County, which was affirmed by the Supreme Court of Mississippi, necessarily involves the question of the location of the boundary line between the States of Arkansas and Mississippi, and that question was not determined in accordance with the rules established and applied by this court in such cases.

In the second place, a federal question is involved in this cause, as we contend, because there was directly drawn in question in the Supreme Court of Mississippi, by motions made by plaintiff in error and defendants in error with reference to the continuance of this cause until the decision by this court of the pending case between the two states, the validity of an authority exercised by this court, and the decision of the Mississippi Supreme Court was against the validity of such authority.

For this second reason, also, we contend that this cause is reviewable by this court on writ of error, and we contend that it is so reviewable for the further reason that the petition for writ of error was presented to this court.

1. THE JUDGMENT OF THE SUPREME COURT OF MISSISSIPPI INVOLVED THE DETERMINATION OF A FEDERAL QUESTION—THE LOCATION OF THE BOUNDARY LINE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI.

The Supreme Court of Mississippi affirmed the judgment of the Circuit Court, and the Circuit Court, by its instructions, submitted to the jury only one issue for its determination. That issue was whether the land in controversy in this cause was situated in the State of Mississippi or in the State of Arkansas, and necessarily, as the instructions show, involved the location of the boundary line between the two states. The judgment of the Supreme Court of Mississippi, therefore, as we contend, necessarily decided this federal question, and its judgment could not have been based on any other ground.

(1) *The judgment of the Circuit Court was based upon a single issue which involved the boundary line between the states.*

It may be that this cause could have been tried without reference to the ownership of the land on which the timber was cut. It is obvious, however, that defendants in error could not safely rely merely on the contention that the timber was taken from their possession by force and intimidation, because it appears that the timber was claimed by plaintiff in error while it still lay on the ground where it was cut; that the defendants in error gave it up at a meeting with plaintiff in error's agents in the State of Mississippi, and thereupon entered the employ of plaintiff in error for the purpose of removing the cut timber, and that this replevin suit was instituted a couple of weeks later after some of the timber had been floated in a raft to the Mississippi shore. (Rec., 46-47.)

Defendants in error, therefore, sought to prove title to the land where the timber was cut to be in their alleged licensors. (Rec., 17, 18, 26.) As the land in question is now separated from the land admittedly belonging to the licensors of defendants in error by Old River, which is about 900 feet wide, defendants in error made the claim that the channel of the Mississippi River was situated farther north and east in 1848 than Old River is to-day, in order to show that the land in controversy is within the State of Mississippi. (Rec., 36-37.) The claim also was made, and is still made in the briefs of defendants in error in this court, that the middle of the Mississippi River meant a line equally distant from the two banks. Thus, as a part of the case of defendants in error, the boundary line between the states became involved in this replevin suit.

When, finally, the case was submitted to the jury, all questions except the boundary question were eliminated. The instructions which the Circuit Court submitted to the jury made the case depend entirely upon the single question of whether the land was situated in Arkansas or Mississippi. The jury were in effect instructed, at the request of defendants in error, that plaintiff in error could recover only if the land in question was shown to be north and east of "a channel" or "the thread" of the channel of the Mississippi River before the avulsion of 1848. (Rec., 160.) It appears from the testimony with reference to the width of the river in 1848 (Rec., 37) and from the briefs for defendants in error in this court, that the contention of defendants in error is that the boundary line is not the thread of the navigable channel as it was before the avulsion in 1848, but a line equally distant from both banks.

The boundary line between the states was, therefore, not only actually involved in this cause, but, under the instructions of the court, it was necessarily involved, and was, in fact, made the sole issue in the case. It is now too late for defendants in error to contend that the case might have been tried on a different issue. The fact is that it was tried on the single issue which involved the location of the boundary line between the two states, and, under the instructions, this federal question was just as necessarily involved as it was in *Cissna v. Tennessee*, 246 U. S., 289.

Under the decision in *Cissna v. Tennessee*, it was not necessary that plaintiff in error should in terms call the attention of the trial court to the question of the boundary line as a federal question. In that case this court said (pp. 293-294):

"The record does not show that Cissna specially set up in the state courts any contention that the decision of the merits turned upon questions of federal law, except as this may appear by inference from the nature of the grounds upon which the decision was rested. But if the Supreme Court of the state treated federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised."

It is true that in that case this court referred to the fact that the Supreme Court of Tennessee, in its opinion, considered the same question as to the boundary line that was considered by this court in *Arkansas v. Tennessee*, 246 U. S., 158. In this case that is impossible because the Supreme Court of Mississippi did not hand down any opinion. This, however, cannot change the fact that a federal question was necessarily involved in the

judgment of that court affirming the judgment of the Circuit Court of Coahoma County.

See, also:

Kaukauna Co. v. Green Bay, etc., Canal, 142 U. S., 254, 269.

(2) *The judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court could not have been based on any ground which did not involve the federal question of the boundary line.*

(a) The Supreme Court of Mississippi could not affirm the judgment of the Circuit Court on the ground that the jury might have based its verdict on a finding that the defendant did not sustain the burden of proof, because the burden of proof which plaintiff in error was required to sustain related only to the location of the boundary line. (Rec., 160.)

(b) It is clear also, that the Supreme Court of Mississippi could not have affirmed the judgment of the Circuit Court on the ground that defendants in error acquired title by adverse possession. No issue based on this contention was submitted to the jury by the Circuit Court. In fact the Circuit Court refused an instruction asked by defendants in error on this ground (Rec., 162), and defendants in error did not move for a new trial or assign any cross errors, or make any motion to take the case from the jury, and, therefore, did not preserve any question whatever on this record which could have enabled the Supreme Court of Mississippi to affirm the judgment on the ground of adverse possession.

(c) Counsel for defendants in error make the further contention that the Supreme Court of Mississippi might have affirmed the judgment of the Circuit Court on the ground that plaintiff in error and defendants in error

asked and obtained similar instructions with reference to the determination of the boundary line question. (Supplemental Brief, 25.) This, however, is not the fact. The plaintiff in error never asked or obtained, as did defendants in error, any instruction to the effect that the boundary line between the states was "the thread of the stream or channel of the Mississippi River at the time of the cut-off in 1848," or "a channel of the Mississippi River where the cut-off in 1848 occurred." Such instructions were given for defendants in error, and, as already stated, the contention of defendants in error is that by thread of the channel was meant a line equally distant from both banks. They sought to show at the trial, not what was the middle of the navigable channel, but how wide the river must have been in 1848 in order to carry off the water. (Rec., 37.) They still contend in this court that the boundary line should be a line equally distant from the banks of the channel as it was before the cut-off in 1848.

On the other hand, the plaintiff in error sought to show at the trial that the deepest water in Old River was close to the Mississippi shore line (Rec., 78), and one of the instructions asked by plaintiff in error at the trial, which was refused, was that the jury, in determining the question presented as to the land from which the timber was cut, should consider the fact, if found to be a fact,

"that this body of water (Old River or Horseshoe Lake) is deeper on the Mississippi side than on the Arkansas side, that the deepest water extends from a short distance north of the old Mississippi shore about one-third of the way across the lake or Old River, and from there north the remaining two-thirds of the way continues to grow more shallow until it reaches, at a very shallow depth, the sloping northern bank with very little bank to show."

In view of this there is no basis for the contention that

the Supreme Court of Mississippi could have affirmed the judgment of the Circuit Court on the ground that the cause was submitted to the jury on similar instructions asked by plaintiff in error and defendants in error. Certainly no such contention can be made with reference to the question of burden of proof. Under the instructions, the question of the boundary line was to be determined on the theory that the burden was upon plaintiff in error to prove that the land in question was in Arkansas and not Mississippi. There was no similarity in this respect in the instructions asked and given for both parties.

(d) The further contention made by defendants in error, that the Supreme Court of Mississippi might have affirmed the judgment of the Circuit Court on the ground that, even if the land in question were in Arkansas, plaintiff in error did not show title below high watermark, is also untenable. Under the instructions, the jury were directed to find for plaintiff in error if the land in question was found to be an accretion to the Arkansas shore and located in that state. (Rec., 160-161.) Defendants in error preserved no objection to these instructions in any way, and the Supreme Court of Mississippi could not, therefore, have affirmed the judgment of the Circuit Court on the ground that the lands were in Arkansas but did not belong to plaintiff in error. (See brief for plaintiff in error on motion to dismiss, 26-29.)

2. A FEDERAL QUESTION WAS DIRECTLY RAISED IN THE SUPREME COURT OF MISSISSIPPI BY THE MOTIONS MADE BY BOTH PARTIES WITH REFERENCE TO THE CONTINUANCE OF THIS CAUSE PENDING THE DETERMINATION BY THIS COURT OF THE CASE BETWEEN THE TWO STATES.

As already set forth in the statement of the case, plaintiff in error, by a motion, called the attention of the Mississippi Supreme Court to the fact that there was then

pending in this court a case between the State of Arkansas and the State of Mississippi which involved the determination by this court of the boundary line between the two states at the same point at which the boundary line is involved in this cause, and asked the court to continue this cause until the decision of that case by this court. (Rec., 178.) This motion was at first granted, but subsequently defendants in error made a motion asking the court to set aside the continuance theretofore granted, upon the ground that the decision of this court in the case between the two states "*will not be controlling in this case, as it may not be rendered, and will not be rendered, upon the same testimony produced in the same way, and the rights of the parties in this particular case are to be determined by the record as made and not by what may be developed at another time and under different circumstances.*" (Rec., 179.) This motion was granted, the continuance was set aside and the cause placed on the docket (Rec., 180), and the judgment of the Circuit Court was subsequently affirmed without an opinion. It must be assumed that the motion of defendants in error was granted by the Supreme Court upon the grounds stated in that motion.

The motion thus made by defendants in error to set aside the continuance directly drew in question the authority of this court to render a decision in the pending case between the two states which should be controlling upon the parties in this cause and upon the Supreme Court of Mississippi. This question was directly raised, and the decision of the Supreme Court of Mississippi was against the existence of the authority claimed by plaintiff in error to be vested in this court. The jurisdiction of this court is invoked upon the express ground that there was drawn in question in the Mississippi Supreme Court the validity of an authority exercised under

the United States, and that the decision of that court was against the validity of such authority (Rec., 187-188), and also on the ground that the Supreme Court of Mississippi denied a title, right, privilege or immunity specially set up and claimed by plaintiff in error under and in accordance with the true boundary line between the two states as fixed and determined by the statutes and authority of the United States. (Rec., 188.)

In *Ireland v. Woods*, 246 U. S., 323, this court said (p. 328):

"We said in *Champion Lumber Co. v. Fisher*, 227 U. S. 445, 451, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question *when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.*"

In the case at bar the existence of the authority of this court to determine conclusively by its decision in the case between the two states the location of the boundary line, so that that determination should be controlling on the Supreme Court of Mississippi and the parties in this cause, was directly drawn in question by the motions made by both parties in the Supreme Court of Mississippi, and the decision of that court necessarily involved a denial of the existence of such authority thus claimed by plaintiff in error. It is difficult to see how the question of the existence of an authority exercised under the United States could be more directly drawn in question than it was by the motion of plaintiff in error, and the subsequent motion of defendants in error to set aside the continuance theretofore granted, on the express ground that the decision by this court in the case pending between the two states would not be controlling and could have no effect upon the decision in this cause. It is clear, also, that the decision of the court denied a title,

right, privilege or immunity under the statutes and authority of the United States expressly claimed by plaintiff in error.

That the federal question thus drawn in question is a substantial one, and that it is an open one in this court, is shown by the opinion in *Cissna v. Tennessee*, *supra*, where a similar question was presented but not decided. (246 U. S., 289, 293.)

We submit, therefore, that a federal question was raised by the motions made in the Supreme Court of Mississippi, and by the decision of the Supreme Court setting aside the continuance theretofore granted and affirming the judgment of the Circuit Court without awaiting the determination by this court of the pending suit between the two states.

The Supreme Court of Mississippi undertook to determine a question regarding the effect and authority of a decision of this court in an original suit between states. It denied what was claimed to be the proper effect to be given to the adjudication by this court of the question of the location as a fact of the boundary between two states. It thus denied what was claimed to be an authority exercised under the United States.

We shall show hereafter that the Supreme Court of Mississippi erred in its conclusion that the decision of this court in the pending suit between the two states could have no effect upon its decision in this cause, and in affirming the judgment of the Circuit Court before the case between the two states was decided.

3. THIS CAUSE IS REVIEWABLE BY THIS COURT ON WRIT OF
ERROR.

The supplemental brief for defendants in error (pp. 7-13) makes the contention that this cause is not reviewable by writ of error under Section 237 of the Judicial Code as amended in 1916. This contention is without merit for the reason already set forth, that there was directly drawn in question in the Supreme Court of Mississippi the validity of an authority exercised under the United States, and the decision of that court was against the validity of such authority. Furthermore, the petition for writ of error in this cause was filed in this court and not in the state court, and the writ of error was issued by this court upon such petition. Under such circumstances, we contend that this court is authorized under Section 237 of the Judicial Code, as amended, to review this cause, even if the petition should more properly have been in the form of a petition for certiorari.

(1) There was drawn in question in this case the validity of an authority exercised under the United States, and the decision of the Supreme Court of Mississippi was against the validity of such authority, and this cause is therefore reviewable by this court on writ of error.

Writs of error are expressly provided for by Section 237 of the Revised Statutes of 1916, "where is drawn in question the validity of a treaty or statute or an authority exercised under the United States, and the decision is against their validity."

The motion of plaintiff in error in the Supreme Court of Mississippi (Rec., 178) asking that court to continue this cause until the decision by this court of the case

then pending between the States of Arkansas and Mississippi, which was at first sustained by the Mississippi Supreme Court, and the subsequent motion by defendants in error (Rec., 179) to set aside the continuance theretofore granted, on the ground that the decision of this court in the pending case between the two states would not be controlling upon the Supreme Court of Mississippi in this cause, directly drew in question the validity of the authority of this court, in the case between the two states, to determine conclusively for all parties, including the parties in this cause, the location of the disputed boundary line between the two states. The order of the Supreme Court of Mississippi setting aside the continuance (Rec., 180) and the subsequent entry of the judgment affirming the judgment of the Circuit Court (Rec., 171) was necessarily a decision against the validity of the authority so claimed to be exercised by this court.

The ground of the motion for plaintiff in error asking the Supreme Court of Mississippi to continue said cause was stated as follows (Rec., 178):

"The issue in controversy in this case is the boundary lines between the State of Arkansas and the State of Mississippi, the appellees claiming under a grant from the State of Mississippi and the appellant claiming under a grant from the State of Arkansas. So that, *the real question involved in this case, determinative of the rights of the parties, is the true boundary line between the said States at the place from which the timber involved in this suit was cut.*

There is pending in the Supreme Court of the United States, and ready for the taking of testimony therein, said cause between the States of Arkansas and Mississippi, which involves only the true boundary line between said states at the very point in controversy in this suit, so that, *a determination of*

the boundary line by the Supreme Court of the United States, which has the final jurisdiction thereof, will determine the boundary line between said States, and whether the land involved is in the said State of Arkansas, as claimed by appellant, or in the State of Mississippi, as claimed by appellees is the basis of contention in this case.

Wherefore appellants move the Court to stay the trial of this action until the determination of said boundary at the very point in controversy in this case, until such determination by the Supreme Court of the United States has been made."

The motion of defendants in error to set aside the continuance, which was at first granted, was based expressly upon the ground that the determination by this court of the boundary line could have no effect upon the decision of this court. (Rec., 179.) There was thus directly drawn in question in the Supreme Court of Mississippi the validity of an authority exercised under the United States, and the decision of that court was against its validity. The statement of this court in *Ireland v. Woods*, *supra*, already quoted, "that the validity of a statute of the United States or an authority exercised thereunder is drawn in question *when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry*," is conclusive on this question. As already stated, it is difficult to see how the question of the existence of an authority exercised under the United States could be more directly drawn in question than it was through the motions of the parties and the decision of the Supreme Court of Mississippi in this cause.

It does not appear that in the case of *Cissna v. Tennessee*, *supra*, the jurisdiction of this court was invoked upon the ground that there was drawn in question in the

state court the validity of an authority exercised under the United States. In the case at bar the jurisdiction of this court is expressly invoked upon that ground by the assignments of error filed with the petition. (Rec., 187-188.)

We submit, therefore, that this case is properly reviewable by this court on writ of error.

(2) *As the petition for writ of error in this case was filed in this court, this court is authorized under Section 237 of the Judicial Code, to review this cause in any event.*

The general purpose of the 1916 amendment to Section 237 of the Judicial Code was to enlarge the jurisdiction of this court to review the decisions of state courts. The second paragraph of this section, as amended, which confers jurisdiction in certain causes by certiorari, begins as follows:

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, etc."

We submit that it would be a singularly technical construction of this language of Section 237 for this court to hold that it was authorized "by certiorari or otherwise" to review a decision of a state court, with like effect as if brought up by writ of error, but that it was not authorized by this language, even on a petition for writ of error filed in this court, to review such a case at all. If this court should hold that the plaintiff in error was not entitled to the writ of error as a matter of right, we submit that this court should, under a statute permitting it to review cases by certiorari or otherwise, take jurisdiction in this case if the petition filed in this

court would have been allowed if in form a petition for certiorari. Considering the evident purpose of Congress in passing the amendment, and the language of the statute as above set forth, this court is certainly authorized to exercise its discretion, on the petition filed in this court, to review the decision of the state court in this case, even if plaintiff in error should be held not entitled to a writ of error as a matter of right.

4. NONE OF THE SURETY COMPANIES MENTIONED IN THE RECORD IS A NECESSARY PARTY TO THE WRIT OF ERROR.

On this point we refer to the brief for plaintiff in error on the motion to dismiss (pp. 13-23). We here merely summarize our contentions:

(1) The United States Fidelity and Guaranty Company, surety on the replevin bond in the Circuit Court of Coahoma County, was not a party to the appeal to the Supreme Court of Mississippi, and the judgment of that court necessarily held that it was not a necessary party. It cannot, therefore, be a necessary party to the writ of error from this court to the Supreme Court of Mississippi.

(2) No judgment appears in the record against the United Casualty and Surety Company, the surety on the appeal bond in the Mississippi Supreme Court (Rec., 166), and the United States Casualty Company, mentioned in the judgment (Rec., 171), is not a party to the record in any capacity, and the judgment is a nullity as to it.

II.

THE LOCATION OF THE BOUNDARY LINE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI,—A FEDERAL QUESTION—WAS NOT DETERMINED BY THE CIRCUIT COURT IN ACCORDANCE WITH THE RULES ESTABLISHED AND APPLIED BY THIS COURT IN SUCH CASES, AND THE SUPREME COURT OF MISSISSIPPI, THEREFORE, ERRED IN AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT.

1. THAT THIS FEDERAL QUESTION WAS ERRONEOUSLY DECIDED BY THE MISSISSIPPI COURTS IS SETTLED BY THE DECISION OF THIS COURT IN *CISSNA V. TENNESSEE*, SUPRA.

It is obvious, from the instructions to the jury (Rec., 160-161), that the Circuit Court of Coahoma County did not decide the federal question as to the boundary line in accordance with the rules established and applied by this court in such cases, and this is in fact conceded by the attorneys for defendants in error in their supplemental brief (p. 22). They admit that the question of the location of the thread of the navigable channel of the Mississippi River at the point in question, (the material question in such cases under the decisions of this court) when the Mississippi River formed a new main channel by the cut-off in 1848, was not considered or decided on this record. The instructions did not submit that question to the jury. Their contention now is that, even though this federal question, involving the location of the boundary line between the two states, was not considered and decided in accordance with the rules established and applied by this court, nevertheless plaintiff in error is not entitled to a reversal of the judgment, even though it involved an erroneous decision of a federal question, because it did not "seek to have the jury pass upon, as a settled fact, that which will be determined by

this court, when the case of *Arkansas v. Mississippi* is decided." (Supplemental Brief, p. 25.)

This contention, obviously, is in direct conflict with the decision of this court in *Cissna v. Tennessee*, *supra*. If the federal question was necessarily involved and decided, the judgment of the state court must be reversed unless that question was correctly decided. In other words, the defendants in error can sustain the judgment in their favor only in case the federal question was decided in accordance with the rules established by this court. Counsel for defendants in error do not contend that it was so decided, and, that being so, it is obvious that the judgment must be reversed by this court.

The instructions to the jury (Rec., 160-161) show that the federal question was not decided in accordance with the rules established by this court, although they necessarily required the jury to determine the question of the location of the boundary line. Shifting the burden of proof to the plaintiff in error did not eliminate the federal question, nor make it necessary that plaintiff in error should assume the responsibility of having the federal question correctly submitted and decided. The burden of proof related only to instructions which involved the location of the boundary line, and the instructions given on behalf of plaintiff in error required the jury to find in its favor if they believed from the evidence that the land in question was "not attached to the Mississippi shore or any accretions formed or attached thereto." (Rec., 161.)

It is clear, therefore, that the federal question as to the location of the boundary between the two states was not only involved and decided, but that it was incorrectly decided, and that the judgment must be reversed, in accordance with the decision of this court in *Cissna v. Tennessee*, *supra*.

2. THE CIRCUIT COURT OF COAHOMA COUNTY ERRED IN HOLDING THAT THE BURDEN OF PROOF IN THIS CASE WAS UPON PLAINTIFF IN ERROR TO PROVE THAT THE LAND IN CONTROVERSY WAS IN ARKANSAS AND NOT IN MISSISSIPPI.

In this case the question of the burden of proof related directly to the decision of the boundary line between the states, and, therefore, not only does not eliminate the question of the boundary line but is directly involved in the decision of that question. This court, therefore, is clearly entitled to review the decision of the Mississippi courts in placing the burden of proof as to the boundary line question on plaintiff in error.

Counsel for defendants in error concede (Suppl. Brief, 33) that there is evidence in this record, as pointed out in the brief for plaintiff in error on the motion to dismiss (p. 30), to show that the land in question was in the possession of plaintiff in error and that no claims were made by others until the trespasses involved in this suit. (Rec., 49-53 and 121.) Moreover, it is conceded that the land in question now adjoins the land which admittedly belongs to plaintiff in error (Rec., 23), while it is separated from the land in Mississippi, on the ownership of which defendants in error base their claim, by a body of water about 900 feet in width. (Rec., 54.)

On the other hand, there is no evidence whatever on behalf of defendants in error of any continuous claim to the possession of the land in controversy, nor to any definite tract of land north of Old River. Nothing is shown in the way of payment of taxes. The only claim made proved finally to be that some of the parties under whom defendants in error claim at some indefinite time—about ten or twelve years before the trial—authorized

others to cut some timber on the land in controversy. (Rec., 31.) The indefinite character of the testimony of the chief witness on this point—Charles McGhee, an old colored man—can be fully realized only by reading it. (Rec., 26, 27, 31.)

Nor is there any evidence which warrants the conclusion that plaintiff in error took the timber from defendants in error by force or intimidation. The timber was still on the land on which it was cut when the agent of plaintiff in error appeared across Old River in Mississippi with a sheriff from Arkansas to demand it and warn defendants in error against future trespasses. The timber was never taken from the actual possession of defendants in error. They yielded it on demand, apparently without question, and thereupon entered the employ of plaintiff in error to rescue the timber from the rising water and remove it to a place designated by plaintiff in error. When the timber was moved into Mississippi this replevin suit was commenced. (Rec., 9-9, 12-15, 19-20, 22, 45-48.)

This evidence certainly did not justify the instructions given by the court in regard to the burden of proof. (Rec., 160.) These instructions not only required the plaintiff in error to prove by a preponderance of the evidence that the lands in controversy were in Arkansas, but required it to assume this burden under instructions which erroneously stated the law as to the location of the boundary line. Thus to throw the entire burden of proof in the case upon plaintiff in error, under instructions which made the issue depend upon an incorrect location of the boundary line between the two states, was clearly erroneous.

3. THE SUPREME COURT OF MISSISSIPPI ERRED IN NOT REVERSING THE JUDGMENT OF THE CIRCUIT COURT, ON THE GROUND THAT A VERDICT SHOULD HAVE BEEN DIRECTED FOR PLAINTIFF IN ERROR.

If the Circuit Court had applied the rule established by this court, in determining the boundary line question involved in this case, there can be no doubt that it must, on the record, have directed a verdict for plaintiff in error. That rule would have fixed the boundary line at the middle of the main navigable channel of the Mississippi River just prior to the avulsion in 1848. On the record in this case, that line must be held to be so located that the land in controversy in this cause is situated in Arkansas and not in Mississippi.

The maps shown as exhibits in the record locate the Arkansas shore in 1816 by a government survey. (Rec., 287; map of "Horseshoe Island and Accretions.") Another survey locates the Mississippi shore in 1833. This shore in 1833 shows a near approach to the present southern bank of Old River. (Map, Rec., 287.) The deepest water in Old River to-day is within about 300 feet of this shore. (Rec., 78.) As long as the channel of the Mississippi River followed the horseshoe-shaped course established prior to 1848, the current would necessarily follow the outside bank and would steadily wear away that bank. (Rec., 86.) The farthest point reached by this process would have occurred just prior to the avulsion of 1848. There has never been as much water in the old channel since that date, and the main navigable channel has followed a different course since then. The conclusion must be that the main navigable channel of the Mississippi River just prior to the avulsion of 1848 would have been near the outside bank of the channel, and that this bank, at the point in question, would have

been at least as far west and south as the present west and south bank of Old River. This would mean that the middle of the navigable channel on that date—the boundary line between the states—was close to the present west and south bank of Old River.

The testimony confirms this natural conclusion. The highest bank of Old River is the southern bank. (Rec., 40.) The north bank is low and gradually sloping. (Rec., 78.) The timber increases in size as you go north from the north bank of Old River. (Rec., 76.) There is a high cane ridge, as appears on the map (Rec., 287), which extends below Section 22 and south of Dustin Pond and indicates high ground longer out of water than the land to the south.

There is no testimony of any substantial character in the record inconsistent with these outstanding facts. The old colored man, Charles McGhee, on cross-examination spoke of water coming in in July, 1857 (Rec., 28), and this has been made the basis of a claim that the water in Old River came in at that time and prior thereto flowed through Dustin Pond. The supposition is contradicted by all the known facts. (Rec., 82.) There is no other testimony of any value to support this theory.

An attempt was made also to show how wide the river must have been to carry the water off. (Rec., 37.) But this was material only if the boundary line was a line equally distant from both banks, and had no bearing on the location of the middle of the main navigable channel.

We submit, therefore, that if the rules established by this court in determining boundary lines are applied to the facts appearing in this record, it must be held that the Circuit Court erred in not directing a verdict for plaintiff in error. Any other decision would be an erroneous decision of this federal question.

III.

THE SUPREME COURT OF MISSISSIPPI ERRED IN SETTING ASIDE THE ORDER CONTINUING THIS CAUSE AND IN AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT BEFORE THE DECISION BY THIS COURT IN THE PENDING CASE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI.

There can be no doubt that if this court had decided the case between the two states, and fixed the boundary line in question before the commencement of this suit, the trial court, in deciding this cause, must have taken judicial notice of the boundary line as thus fixed by this court. If the state court in such a case must accept and apply the rules of law established by this court, as was held in *Cissna v. Tennessee*, *supra*, it follows that it must notice and enforce a judgment of this court which fixes as a fact the location of the boundary line between two states. The jurisdiction of this court extends not only to the settlement of the rules of law which shall govern in such cases, but to the location of the boundary line as a question of fact, and its judgment determines that fact not only for the parties before it, the two sovereign states, but for all parties whose rights or interests are dependent upon the location of such boundary line. This is so because of the nature of the question determined—the political rights of sovereign states—and because this court is the only tribunal authorized to determine that question as a question of law and fact arising between sovereign states.

It is no doubt true that boundary questions between sovereign states are not usually left to the determination of regular courts exercising judicial powers only. In this country, however, the judicial power to determine controversies between the separate states has been

conferred by the states upon this court, and its judicial power with respect to the settlement of boundary controversies between the states is no longer open to question. The fact, however, that this court has jurisdiction of such controversies as a court does not mean that its power is confined to the determination of such questions for the parties before it—the two states—and that it is open to other parties to litigate the same question in controversies between themselves, regardless of the decision of this court in the case between the states. Although the procedure in a case in this court between two states is judicial, and the judgment that of a court, the question determined is in fact a question of public international rights arising between sovereign states. This court has held that the boundary question in such a case is not a political question in the sense that it cannot be settled by the judicial determination of this court (*U. S. v. Texas*, 143 U. S., 621, 641), but it is, nevertheless, a public question, and in that sense a political question, arising between sovereign states, and not merely a question of the proprietary interests of the states as corporate bodies.

That being so, it follows that other courts must take judicial notice of the location of a boundary line by the judgment of this court in a suit between two states, for the same reason that they take judicial notice of boundary lines between states or other political subdivisions when fixed and established by some other tribunal than a court. It is unnecessary to cite to this court the many cases in which judicial notice has been taken by courts of boundary lines thus determined. It is settled that the courts and all parties are bound to take notice of the location of such boundaries as a fact.

See, for instance, *Bluefield Waterworks & Imp. Co. v. Sanders*, 63 Fed., 333, where the court held that it was

bound to take notice of a boundary line between counties, subsequently made a boundary line between the States of Virginia and West Virginia, as located by commissioners duly appointed under a Virginia statute of 1845, and could not undertake to authorize the location of a better and straighter line.

Considering, therefore, the nature of the fact which is determined by this court in suits between the states for the purpose of fixing a disputed boundary line, it follows that it can make no difference that the Circuit Court of Coahoma County rendered its judgment in this cause before the case between the two states was commenced. For that reason it could not be called to the attention of the Circuit Court, as counsel for defendants in error suggest. (Suppl. Brief, pp. 22-23.) It must nevertheless be true that, if this court had decided the case between the states before the decision of this cause by the Mississippi Supreme Court, the Mississippi Supreme Court must have taken judicial notice of the location of the boundary line as determined by this court. Whenever that political fact is properly determined, all courts, appellate courts as well as trial courts, must take judicial notice of it.

The conclusion, therefore, of the Mississippi Supreme Court that the decision of this court in the pending case between the two states could have no controlling effect upon the decision in this cause was clearly erroneous, and the federal question as to the authority of this court that was drawn in question in the Mississippi Supreme Court was, therefore, erroneously decided. That was the only question, as the record shows, which was decided by the Mississippi Supreme Court with reference to this particular matter. The court was not asked to set aside the continuance theretofore granted except upon

the ground that the decision of this court in the case between the two states could have no effect upon the decision in this cause. (Rec., 179.) That this decision of the court was erroneous there can be no doubt.

But the decision of the Mississippi Supreme Court would have been erroneous even if based upon the ground that, while the decision by this court of the pending case between the two states would be controlling if already rendered, it was not required to await the decision of this court. This follows again from the nature of the question which this court is called upon to decide in the case between the two states. As already pointed out, that question, although subject to the determination of this court, involves the determination of a public fact. It is the determination of a political fact arising between sovereign states, and courts are required to take judicial notice of such facts, however they may be legally determined. When the properly authorized tribunal has assumed jurisdiction to determine that question, the jurisdiction of all other courts or tribunals to decide the same question is necessarily superseded. Can there be any doubt that if the states were authorized, under the Constitution, to select a special arbitration tribunal to determine disputed boundary questions, the appointment of such a tribunal by two states, and the submission to it of jurisdiction of a case to determine the boundary line as a fact, would supersede the power of all courts to determine that question in cases between private parties pending before them? Under the Constitution as it stands, this court has already been selected by the states as the tribunal to determine such disputed boundary questions. That being so, can there be any doubt that when this court has taken jurisdiction under the Constitution of a proceeding between two states to determine, as a public question, the location of a disputed boundary

line, the jurisdiction of all other courts to decide that same question is necessarily superseded?

Defendants in error in this cause not only could not claim, as a matter of right, that the Supreme Court of Mississippi should decide this cause without regard to the decision of this court in the case between the states, but the power of the court itself to proceed was superseded by the action of the State of Mississippi, under the Constitution, in submitting the question of the boundary line to this court for determination. Consent to that proceeding was already given, but the jurisdiction of this court to determine judicially that public question was invoked when the pending suit between the two states was commenced in the regular way.

Defendants in error are deprived of no vested right if they are now required to await the judgment of this court in the case between the two states, which their own sovereign State of Mississippi has already agreed shall be the only conclusive determination of the location of the boundary line. They must now seek to sustain their claim through the action of their own state, under the Constitution, in submitting to the jurisdiction of this court the authority to settle that question as a question of public international law.

The commencement of the suit between the states was a new fact with reference to the question involved in this cause. It meant that the boundary line between the two states—a federal question—was *then* located at the place at which this court should, in that suit, determine it to be. What this court determines is the location of the boundary line as it has always been since 1848 under the treaties and statutes of the United States. The authority, however, to determine that question is now vested exclusively in this court in the pending case be-

tween the two states. The Mississippi Supreme Court could proceed only on the assumption that it could now take judicial notice of the location of the boundary line as this court may finally fix it. That it cannot do, and has not attempted to do. Instead, it has disregarded the authority of this court, already invoked by the two sovereign states, to determine this question of public international law, and has in fact assumed authority to determine that question in this cause for itself.

We submit, therefore, that the Supreme Court of Mississippi erred in setting aside the order continuing this cause, and in affirming the judgment of the Circuit Court, while the case between the states was pending in this court and undetermined. It follows that the judgment of the Mississippi Supreme Court must be revised, but we respectfully submit that this cause should be retained by this court, and no order entered therein, until the case between the two states is finally disposed of by this court.

Respectfully submitted, '

HERBERT POPE,
Attorney for Plaintiff in Error.

ALBERT M. KALES,
Of Counsel.

14.

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F I L E D

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No. 171.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1918.

RUST LAND AND LUMBER COMPANY,
Plaintiff in Error,

v.

ED JACKSON, ET AL,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF
MISSISSIPPI.

BRIEF ON THE MERITS IN REPLY,
FOR DEFENDANTS IN ERROR.

GERALD FITZGERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1918.

RUST LAND AND LUMBER COMPANY,
Plaintiff in Error,

v. No. 171.

ED JACKSON, ET AL,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF
MISSISSIPPI.

BRIEF ON THE MERITS IN REPLY,
FOR DEFENDANTS IN ERROR.

STATEMENT.

The Brief for Defendants in Error on the merits, having been filed prior to the receipt of the Brief for Plaintiff in Error, this reply is filed.

Opposing counsel is in error in claiming that there was only one question in this case, and that, a question of boundary between Arkansas and Mississippi. The questions in this case were many; one of which was, as held by the Circuit Court, that as Plaintiff in Error took, by force, from defendants in error the logs in controversy, the Plaintiff in Error could only recover by proving ownership of the land from which the timber was cut.

Defendants in Error, at law, could not appeal from a judgement in their own favor. There was but a single judgment—an entirety—and therefrom no appeal could be prosecuted by them.

The questions involved in the Supreme Court of Mississippi were far broader than a mere question of boundary. The Court was not limited, in its powers, to a mere consideration of matters, not vital or fundamental; but, irrespective of the instructions of the Court below, it was bound to render the judgment which was, in its opinion, right upon the law and the facts. We differ with counsel as to what was done upon the trial of this cause below, and, having been in it there, we are in better position to speak than is opposite counsel whose connection began with the filing of the Petition for the Writ of Error in this Court.

POINT I.

The judgment of the Supreme Court of Mississippi should be affirmed, if the motion to dismiss is denied, because,

(a) The affirmance of the judgment of the Circuit Court of Coahoma County, without an opinion, could not and did not decide any Federal question. It was a general affirmance of a judgement in replevin for the possession of logs, severed from the land, personalty, which had been taken by force and intimidation from Defendants in Error. Primarily, the right of Plaintiff in Error to recover depended on the question of title; and this did not draw in question the validity of any treaty or law of the United States, of any State under the Federal Constitution. If any Federal question had been decided, it would have been the duty of the State Supreme Court to have written an opinion; for Section 4918, Code 1906, requires the Court to write opinions "in all cases settling important principles" (*Y. & M. V. R. R. Co. v. James*, 108 Miss., 652). This Court will not presume that the Supreme Court of Mississippi disregarded this statute.

No application for a writ of error herein was made to any judge of the Supreme Court of Mississippi. They alone knew what was decided and why.

(b) The boundary line between Arkansas and Mississippi is defined by the respective Constitutions, statutes and decisions of these States, and this, under express authority of the Acts of Congress.

(c) Even conceding the rule announced in **Iowa v. Illinois**, 147 U. S. 1, as a general principle, it has no application, for Arkansas and Mississippi have by their Constitutions, statutes and decisions fixed the practical location of the boundary line as the middle of the river, or thread of the stream.

(d) The Plaintiff in Error was held by the State Circuit Court to have the burden of proof, and it failed to make this proof, and, upon the trial, the jury found a verdict against it. This failure to prove its case could not involve a Federal question; but, it would be a proper ground for the Supreme Court to affirm the judgment without an opinion, as it would not settle any new or important principle.

(e) The evidence showed that the ownership of the land of Plaintiff in Error did not extend beyond high water mark on the Arkansas side, and the boundaries of the lands to which Plaintiff in Error had title could not involve a Federal question.

POINT II.

This cause is reviewable only by certiorari.

(a) There was not drawn in question the validity of any statute, treaty or authority exercised under the United States.

(b) The necessary parties were not brought before this court as parties to said writ of error.

(c) The plaintiff in error has in effect confessed that this writ of error would not lie by now making a motion in this Court for a certiorari.

POINT III.

The boundary between Arkansas and Mississippi was not determined by the State Supreme Court; but if so, such determination was in strict accordance with the law.

POINT IV.

The Supreme Court of Mississippi did not err in setting aside a continuance.

(a) Such action involved a construction of that Court's own rules requiring notice to be served.

(b) The erroneous decision of a State Court, as to a continuance if it existed, as it does not, would not be reviewed by this Court.

ARGUMENT

I-(a)

This Court will not reverse the judgment of the Supreme Court of Mississippi because the line between Mississippi and Arkansas is controlled by the respective Constitutions, statutes and decisions of the States, ratified expressly and impliedly by Congress.

The fundamental fact, is that the boundary line in question has been fixed by the respective States in their several Constitutions, and these Constitutions are to be construed by the Supreme Courts of these said States,

and their rights are governed thereby, and not by the interpretation placed by this Court upon the line between other States, and especially not between Arkansas and Tennessee, 246 U. S. 158; **Cissna v. Tennessee** 246 U. S. 289; **Arkansas v. Tennessee**, 247 U. S. 461.

In 1817, Mississippi came into the Union under said act of Congress, defining its boundaries, and thereafter, in 1836, Arkansas came into Union. The boundaries are delineated, so far as the United States was concerned, in the acts of admission, and the status fixed for Arkansas was in view of the previous fixed boundary status of Mississippi.

Since the admission of these States, in 1909, Congress passed an Act whereunder it was provided:

“That the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, the Mississippi River now, or formerly, formed the said boundary line, and to cede respectively, each to the other such tracts or parcels of the territory of each state as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River, and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of said States upon the waters of the Mississippi River. Approved January 26, 1909.”

This Act enjoys the unique distinction of having been quoted in full in **Washington v. Oregon** 214, U. S. 217, this Court then declaring: “We submit to the States of Washington and Oregon whether it will not be wise for

them to pursue the same course," to adjust their differences.

Defendants in Error contend that Arkansas and Mississippi, by their respective constitutions, have fixed the boundary line in question independently of any decision of this Court upon the principles applicable in *Iowa v. Illinois*, 147 U. S., 1, which boundary line so thus fixed by the Constitutions of said several States, has become conclusive under the authorization heretofore set forth from Congress. *Washington v. Oregon* 214, U. S. 217.

(a) The Western boundary of the State of Mississippi:

(1) The preamble of the Constitution of Mississippi, adopted August 15, 1817, declared (So far as material):

"We, the representatives of the people inhabiting the western part of the Mississippi Territory, contained within the following limits, towit: Beginning on the River Mississippi, at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee River * * * * * thence west along said degree of latitude to the Mississippi River; thence up the same to the beginning, assembled in convention * * * in pursuance of an Act of Congress, entitled: 'An Act, to enable the people of the western part of the Mississippi Territory to form a Constitution and State government; and for the admission of such State into the Union on an equal footing with the original States,' in order to secure to the citizens thereof the rights of life, liberty, and property; do ordain and establish the following constitution and form of government, and do mutually agree with each other to form ourselves into a free and independent State, by the name of the STATE OF MISSISSIPPI."

In *Morgan v. Reading*, 3 S. & M. (Miss., 1844) 366, uniformly approved since in *Richardson v. Sims*, 80 So. (Miss., Dec. 2, 1918) 4; *Cook v. State*, 81 Miss. 146 (applied but not cited); *Boom Co. v. Dixon*, 77 Miss., 593; *Railroad Co. v. Frederic*, 46 Miss., 9; *Magnolia v. Marshal* 39, Miss., 109; *Com'rs v. Withers* 29 Miss., 33), there was a controversy as to the boundaries of the State on the Mississippi River. The case was elaborately argued, and the opinion was by Chief Justice Sharkey. The question therein was: "Has the owner of the bank of the Mississippi River a right to recover for use and occupation, or riparian rent, for the use of the bank below high water mark, or is it subject to the unrestricted use of the persons navigating the Mississippi" (p. 396).

The Court declared that counsel for the plaintiffs in error "have addressed us a very ingenious argument, evincive of great research, in favor of the rights of their clients. In support of this position, we are referred to the laws of nature and of nations; the common law, the French and Spanish laws; and treaties and Acts of Congress."

The Court then set forth the treaty between Great Britain, France and Spain in 1763, wherein Great Britain was ceded all territory east of the Mississippi and north of the River Iberville, and the boundary fixed "by a line drawn along the middle of the River Mississippi from its source to the River Iberville," etc., and saying: (p. 397)

"Great Britain continued to be the owner of this ceded territory until the 30th of November 1782, when, by provisional treaty, she acknowledged the independence of the United States, bounded on the west, above the 31st degree of north latitude, by a line drawn along the middle of the Mississippi River, corresponding exactly with the boundary in the treaty with France. This provisional treaty subsequently was incorporated into the definitive treaty of peace concluded on the 3rd of September, 1783." * * * *

This left Louisiana bounded on the east by the same line, the middle of the river, **Myers v. Perry**, 1 La. Ann. 372), above the River Iberville, as it had been established by the treaty of 1763; and by that boundary it was ceded by France to Spain and by Spain retroceded to France, and, ultimately by France, in 1803, to the United States; so that no variation in this line, up to that time had taken place."

The opinion then recites the establishment of the Mississippi territory in 1798, saying: "In 1798, whilst this was still the line between the United States and the province of Louisiana, Congress established the Mississippi Territory, bounding it on the west" by the Mississippi." Laws of U. S. V. 3, p. 39; and in 1817, Mississippi was admitted into the Union, with its boundary up the Mississippi River, from the 31st degree of north latitude to the Southern point of Tennessee on that river."

It further recites the division of Louisiana into two territories in 1804, and its admission into the Union in 1812 with her boundary running "down said river," and then declares that:

"In defining the territorial and state boundaries, Congress adopted the more general mode of defining boundary on water courses, and omitted to designate the middle of the river as the limit, but, as we shall endeavor to show, did not thereby change the original boundary."

It then sets forth the adoption of the common law as a part of the jurisprudence of Mississippi and declares, (p. 399):

"The Common Law, by construction, extends grants, bounded 'by', or 'on' or 'along', a fresh water stream, to the thread of the stream. The Mississippi Territory, by this rule, extended to the middle of

the river. All west of that line was owned by a foreign power, and we cannot suppose that Congress, under the circumstances, designed to limit the jurisdiction of the territory by the bank of the river. Having shown then that the Common Law was adopted for the government of the Mississippi Territory, and that the line of the territory was the middle of the river, it follows, that the rights of riparian owners on the east shore, must be determined by the Common Law. We thus dispose of the argument as invokes the rules of Civil Law.”

And then again declared, page 403:

“It seems that the Common Law rule admits of no modification in consequence of the magnitude of a river. On the Ohio River, which is certainly one of the first magnitude, the Common Law prevails in regard to the rights of riparian proprietors. **Lessee of McCulloch v. Aten**, 2 Ohio Rep., 307; **Lessee of Blanchard v. Porter**, 11 Ohio Rep., 138. And in that State it has been adjudged that the ordinance of 1787, for the government of the North-Western Territory, which declares that the navigable waters leading into the Mississippi shall be common highways, and forever free, does not impair or abolish the Common Law principle, that he who owns the bank, owns to the middle of the river, subject to the easement of navigation. See 3 Kent’s Com. (5th ed.) 427 and notes.”

And then, after reviewing many decisions, declares (p. 406):

“The authorities cited establish the following conclusions: (1) That even the seashore, which is generally subject to public use below ordinary high water mark, is not subject to such use when it has become private property, such use being inconsistent with private right. (2) That there is a material

difference between rivers which are navigable, and those which are not navigable, according to Common Law meaning of the term. On rivers not navigable, the riparian proprietor, by construction of the Common Law, owns to the thread of the stream, unless restricted by the grant; and the bank being private property, subject to the exclusive appropriation of the owner, is not subject to the use of of the public, although the river itself be a public highway, the use of which may not be interrupted by the owner. (3) That as the bank cannot be used without the consent of the owner, * * *"

(2) By act of the legislature of Mississippi, approved March 1, 1854, the Judges of the High Court of Errors and Appeals were required to appoint three commissioners to revise, digest and codify the laws of Mississippi, and to propose such alterations or amendments thereto, and such new laws, as they may deem expedient.

The Judges appointed William L. Sharkey, Samuel L. Boyd, and Henry T. Ellett as such commissioners, and Mr. Boyd having resigned, Wm. L. Harris was subsequently appointed in his place. Introduction Revised Code of Mississippi, 1857.

The report of the commissioners was presented to the legislature in January, 1856, and after consideration of some few chapters, it was determined to postpone the residue until the first Monday of December, 1856, and to hold a special session of the legislature at that time for the purpose of acting on it.

This special session continued upwards of sixty days and resulted in the adoption of the laws contained in that volume.

“The commissioners took the existing statutes as the basis of their action, and preserving the main body of the laws, only prepared such alterations and amendments, and such new laws as seemed to be demanded by the present circumstances of the State, and necessary to make the system harmonious and complete. The original drafts, reported by the commissioners, underwent the rigid scrutiny of the legislature and were freely amended and modified in many particulars.” (Introduction Revised Code of Mississippi, 1857, III.)

Judge William L. Sharkey was Chief Justice of Mississippi from 1832 until after 1850, covering in his judicial career all of the Howard (Mississippi) reports, as well as fourteen volumes of the Smedes & Marshal Reports and held, in addition, many other public offices, and takes rank as, probably, the greatest jurist Mississippi has ever had.

Judge Henry T. Ellett was, also, a lawyer of distinction, and presided as a member of the Supreme Court for a number of years, his opinions being found from 39 to 41 Mississippi Reports.

Judge William L. Harris was, also, a judge of the Supreme Court, his opinions are to be found from 35 to 41 Mississippi Reports.

These judges held other and important public offices in Mississippi, and they were thoroughly familiar with its history, legislative, political and judicial.

The legislature at its session of 1856 adopted a historical report by Chief Justice Sharkey and Justices Har-

ris and Ellett and embodied it in the Code of 1857 (p.47) as follows:

“It is desirable that the boundaries of the State should be defined with accuracy, and as some doubts have heretofore existed, arising from the use of general terms, particularly with regard to the precise line of the western boundary, it has been deemed necessary, by way of introduction to this chapter, to show from treaties and public acts, to what precise point the State is authorized to extend its jurisdiction, so that it may not seem to claim what does not properly belong to it. * * *

“The Western boundary of this (Georgia) cession was only defined as being ‘within the United States,’ and the southern boundary of this cession was defined by reference to the dividing line between Spain and the United States. It becomes necessary, therefore, to ascertain the true western boundary, and also the southern boundary of the United States.

“First of the Western Boundary.—By the treaty between Great Britain, France and Spain, concluded the 10th of February, 1763, the line between Louisiana, or the French possessions west of the Mississippi River, and the British possessions on the east, was fixed and defined by a line drawn along the middle of the River Mississippi, from its source to the River Ibberville. All west of this line was known as Louisiana. This boundary remained unchanged, and when, by the treaty of 1783, Great Britain acknowledged the independence of the United States, this same line, the middle of the Mississippi River, was designated as the western

boundary, and of course from that time until 1803, it was the dividing line between France and the United States, as it had previously been the line between Great Britain and France. In 1803, France ceded Louisiana to the United States by a general designation of the territory by name, which, of course embraced all that had previously been a part of Louisiana, including the **western half** of the Mississippi River. (*Italics ours.*)

“Before Louisiana had been acquired, to wit: in 1798, Congress had established a territorial government over the Mississippi territory, without prejudice to the rights of Georgia, and although the middle of the Mississippi River was not expressly mentioned as the western boundary, but the more general expression, bounded on the west by the River Mississippi, was adopted; yet it must have been the intention of Congress to make the limits of this territory co-extensive with the jurisdiction of the United States on the west, otherwise **the east half of the river** would have been left subject to no jurisdiction. (*Italics ours.*)

“In 1804, Congress established the Orleans territory, embracing all that portion of country ceded by France to the United States, under the name of Louisiana, south of the Mississippi Territory, and of an east and west line to commence on the Mississippi river at the thirty-third degree of latitude, to extend west, etc. The middle of the river was not mentioned as the eastern boundary of this territory and yet it was made so by necessary consequence, by the use of the words, ‘All that portion of country, ceded by France to the United States, under the name of Louisiana, etc.;’ as by that cession Louisiana passed to the middle of the river.

“It was clear, therefore, that the **middle of the Mississippi River** was the dividing line

between the territories of Mississippi and Orleans. (*Italics ours.*)

“In 1812, Louisiana, which had constituted the territory of Orleans, was admitted into the Union; the eastern boundary being defined only as ‘down the Mississippi river from the thirty-third degree of latitude, to the River Ibberville.’ In view of what has been shown, the words used by Congress, to-wit: ‘down said river (the Mississippi), to the river Ibberville, etc.’ must be understood as meaning down the thread of the river, as the line had been before defined.

“By the Act of Congress of 1817, authorizing the people of Mississippi territory to form a State Constitution, it was declared that the boundary of the State should be as follows, to-wit: ‘Beginning on the Mississippi River, at the point where the southern boundary line of the State of Tennessee strikes the same; * * * thence west, along the said degree of latitude, to the Mississippi River; thence up the same to the beginning.’ And with this boundary Mississippi was admitted to the Union in the same year.

“Here too we must understand the general expression ‘up the same (the Mississippi) to the beginning, as having reference to the **middle of the river, or thread of the stream**, as the line had been previously defined, and it follows that the State has a right, by Act of the Legislature to extend her jurisdiction that far, as this has undoubtedly been the precise boundary line between the territory lying east and west of the Mississippi river, ever since 1763.” (*Italics ours.*)

It will thus be seen that the legislature at this time (1856) took jurisdiction over the **eastern half of the river**, and defined as its boundaries that which was midway between the fixed banks.

Then Article 1, Section II, Code 1857, p. 49, provides:

“The limits and boundaries of the State of Mississippi are defined as follows, to-wit: Beginning on the Mississippi river (meaning thereby the centre of said river or thread of the stream), where the southern boundary line of the State of Tennessee strikes the same, as run by B. A. Ludlow, D. W. Connelly, and W. Petrie, commissioners appointed for that purpose on the part of the State of Mississippi, in 1837, and J. D. Graham and Austin Miller, commissioners appointed for that purpose on the part of the State of Tennessee; thence east * * * * thence west along the said degree of latitude to the middle or thread of the stream of the Mississippi River; thence up the middle of the Mississippi River, or thread of the stream, to the place of beginning, including all islands lying east of the thread of the stream of said river.”

Code 1857, p. 50, Art. 2, Section II, provides:

“The Counties lying immediately on the Mississippi River shall, respectively, have and possess jurisdiction and extend to the middle of the river, or western boundary of the State, within the space embraced by extending their boundary lines, which strike the river, on a continuous direct course to the extreme boundary of the State, including all islands that may be within the limits just defined;” etc.

We thus have an express legislative declaration, therefore, that, so far as Mississippi was concerned, beginning in 1763, and continuing up to 1857, the boundary as between Mississippi and Arkansas had been fixed at the **middle of the river, or thread of the stream**, and from the enactment of the Code of 1857 to the present day an interesting further exemplification of our contention is shown.

(3). Shortly after the passage of the Code of 1857,

there arose the case of **Magnolia v. Marshall**, 39 Miss. (1860), 109, which was elaborately briefed, and decided by Mr. Justice Harris, who acted as a Commissioner in preparing the Code of 1857. The opinion there said:

“The agreed state of facts in this record are almost identical with the case of **Morgan & Harrison v. Reading**, 3 S. & M., 366, decided in this court. What are the rights of the riparian owners, and what the **jus publicum** incident to the free navigation of the Mississippi, are questions there discussed, and are the important questions here again presented.”

The opinion then declares (p. 116) that:

“It has been the chief end and policy of civil society to assign to everything capable of ownership a legal and determinate owner; to secure common or public rights so far as the interest of the public require; to furnish a proper line of demarcation between these rights, common to all, and those private rights which belong to each individual as his exclusive property; and thus to promote the general peace and harmony of mankind;” and then quotes to approve; “That rivers not navigable.....do, of common right, belong to the owners of the soil adjacent.....that this ownership of the citizens, in both the soil and the use of the water of the rivers, is absolute; subject only to the right of way or public easement therein, where the same is capable of such use. That when the citizen derives his title to land bounded on a river, not navigable (that is, not on tide water), by grant from the State, such grant extends to the middle of the river——‘**usque filum aquae**’ ”.*.*.

(p. 191) “And so as between nations, where an arm of the sea or a river is the boundary between them, if the original right of jurisdiction is in neith-

er, and there is no agreement respecting it, each holds to the middle of the stream; while the public easement or right of **innocent use** still remains undisturbed thereby."

citing therefor the opinion by Mr. Justice Story, in the Schooner *Fame*, 3 Mason, 149, in which case Mr. Justice Story, with reference to this precise point said:

"The general principle in relation to the rights of a nation to rivers and bays, of which it has an exclusive and prior occupancy, as laid down by **Vattel** and **Martens** in the passage cited at the bar, need not be disputed. Whether there has been, in point of fact, such exclusive occupancy, is often a matter of great difficulty to ascertain. The natural breadth, and extent of a river or bay, and the necessity of its constant use, in all parts, for purposes of trade and navigation, by the natives inhabiting the opposite banks must, in many cases, repel the supposition of an exclusive right. Where no exclusive right exists, the general principle of the law of nations, as deduced from the authorities, is, that each nation has a right to go to the middle of the stream, calculated from low water mark, as the limit of its territorial boundary. This doctrine has been affirmed by the Supreme Court in the case of **Hadley's Lessee v. Anthony**, 5 Wheaton, 374. But although the territorial line of a nation for purposes of absolute jurisdiction may not extend beyond the middle of the stream; yet, consistently with this doctrine, the right to the use of the whole river or bay for the purpose of navigation, trade, and passage may be given to both nations. Such a right does not destroy the territorial jurisdiction to the middle of the stream; but it is in the nature of an easement, as it is called at Common Law, or a servitude, as it is called in the civil law. It is like the

right of a highway, or private way, over the land of another. This right of passage and navigation must exist, as a common right, in all those cases, where such passage or navigation is ordinarily used by both nations, and is indispensable for their common convenience, and access to their own shores. A river or bay may be so narrow, or irregular, or so liable to difficulties from winds, waves, and currents, that it cannot be navigated by either nation without the necessity of the right of passing over the whole waters at all times. If, in such a case, no exclusive right is recognized in either nation, the constant use by both is conclusive proof of a common right of navigation and passage in both.

“These are all the principles which I think it necessary to bring into review on this occasion, so far as the case stands upon the general law of nations,” and held that the fixed line was midway between the fixed banks of the bay.

And it is interesting to note that Judge Story was a member of the this Court at the time of the decision of **Hadley's Lessee v. Anthony**, 5 Wheat., 374, and which this distinguished Justice cites as sustaining that doctrine. The rule announced in the case of “The Schooner Fame” was followed by the Supreme Court of the State of Mississippi in 1860 as containing a correct definition of boundaries, and re-affirmed its decision, made in 1844, in 3 S. & M., *supra*.

The Supreme Court of Mississippi again says in the Magnolia case (p. 120):

“On the other hand, a doctrine wholly opposite to this, and founded upon reasons equally clear and satisfactory, was established in relation to fresh water streams, whether having **capacity** for naviga-

tion or not, which were **intra-territorial**, and over which the government had **exclusive right and dominion**.

“In relation to this class of rivers, the right of navigation was always wholly dependent on the **will** of the sovereign having the right of property in the soil; and by the laws of nations, such streams were ‘**not navigable**’ for other nations, except by treaty or special permission of the local sovereign. Hence they are called ‘**not navigable**,’ in **contradistinction** to such waters, etc., as were common to all nations.

“In the construction of grants of land made to the citizen and bounded on these fresh water streams, over which the sovereign had exclusive title and jurisdiction, there could be no question of the **right** of the sovereign to part with the title of the soil to the grantee. It became therefore a mere question of intention. The Courts of common law applying to these deeds or grants the ordinary rule of construction, in cases of doubt, construed the grant most strongly in favor of the grantee; and upon the further presumption that the grantor, in parting with his land on both sides of a water course whether capable of navigation or not, could scarcely have intended, without express clause to that effect, to reserve the water-course to himself have held with unvarying uniformity in England, from the earliest period down to the day that such grants, bounded **on, or by, or at**, such water-course, conveyed to the respective riparian grantees the right of soil and the use of water (subject to the **jus publicum**) **ces que ad filum aquae**.”

The Court said in said case (p. 130):

“A much shorter, and, to my mind, more satisfactory mode of reasoning, reaching the same conclusion, may be deduced from a few well-settled

principles of the common law of almost universal application.

“All grants and contracts are to be construed as having reference to the laws and policy of the State or country where the contract is made, or the property which forms its subject is situate.

“At the time the title to the lands in question on the banks of the Mississippi River were granted by the government of the United States, the common law prevailed in the State of Mississippi. Indeed, the common law had probably prevailed over this territory as a part of the British grant to Oglethorpe of the colony of Georgia, long anterior to the deed of cession by Georgia to the United States; see **Morgan et al v. Reading**, 3 S. & M., 366. The purchasers of these lands bounded on, or by, or at, the Mississippi River, therefore, took such right, title, and boundary as the language and construction of these grants imported by the rules of the common law.

“We have already seen that there is not a case to be found, either English or American, which doubts or disputes that by the common law of England the right of the riparian owner, on the banks of fresh water streams, extends to the middle of the stream, subject always to the public right of free navigation.”

And then, at page 135, the Court declared:

“The whole legislation of Mississippi in relation to her western boundary is founded upon the rule of the common law, and her jurisdiction and right of soil to the middle of the river has been again and again asserted and acted on without dispute or denial. See Rev. Code, (1857) pp. 47-49 and 67, Art. 101.”

Thus, we have an express declaration by the judiciary, adopting as correct the declaration of the legisla-

ture that the eastern half of the Mississippi River was a part of Mississippi and the east half of the Mississippi River does not mean a third or fourth, or anything else than one half of the river between bank and bank.

That this is correct is demonstrated by the decision in Arkansas of **Cessill v. State**, 40 Ark., page 505, where the doctrine of our cases is made the foundation of a similiar construction of Arkansas' Constitution.

(5) Next comes the Constitution of Mississippi of 1869, adopted in Convention, May 1868, ratified by the people upon the 1st day of December, 1869. Miss. Code, 1871, p. 656, Code 1880, p. 19.

By Article 2 of that Constitution, it is declared:

“The limits and boundaries of the State of Mississippi shall remain as now established by law.”

At the date of the adoption of this Constitution, “the limits and boundaries,” as embodied in the Code of 1857 had acquired a fixed, definite, judicial interpretation by the decisions of **Morgan v. Reading**, 3 S. & M., 1844, *supra*, and by the Magnolia case in 1860; and when the Constitution was adopted that decision became integrated into it as the legislative declaration contained in the Code of 1857.

Under the settled rule in Mississippi, when a judicial decision has construed a statute, and that statute is subsequently enacted, the judicial decision construing it is integrated into the new adoption. **Shotwell v. Covington**, 69 Miss., 735; **Weatherby v. Roots**, 72 Miss., 355; **Hay v. Hay**, 93 Miss., 732; **White v. R. R. Co.**, 55 South., 593.

The State of Mississippi adopted as a part of its Constitution this declaration above quoted, under which

the State took jurisdiction over the eastern half of the Mississippi River extending to the middle of said river, as defined by Mr. Justice Story in the case of "The Fame," and following the decision of that learned justice, it has embodied in the Constitutions of Mississippi, beginning with 1868, and extending to the present date, exactly the same declaration.

(6). The Constitution of Mississippi of 1890, however, does not provide that "the limits and boundariesshall remain as now established by law" as did the Constitution of 1869, but makes express declaration (Mississippi Code 1906, Art. 2, Sec. 3) thus:

"The limits and boundaries of the State of Mississippi are as follows, to-wit: Beginning on the Mississippi River (meaning thereby the center of said river or thread of the stream) where the southern boundary line of the State of Tennessee strikes the same, as run by.....commissioners appointed for that purpose on the part of the State of Mississippi A. D. 1837, and.....commissioners appointed for that purpose on the part of the State of Tennessee, thence east.....thence west along said degree of latitude to the middle or thread of the stream of the Mississippi River, thence up the middle of the Mississippi River, or thread of the stream, to the place of beginning, including all islands lying east of the thread of the stream of said river, and, also, including all lands which were at any time heretofore a part of the State.

Thus, expressly, adopting the verbiage found in the Code of 1857, and this has continued to be the law ever since as a part of the Constitution of Mississippi, and was so interpreted in:

(7). **State v. Cook**, 81 Miss., 150.

(8). Miss. Code of 1871, Section 18, contains a

change in verbiage of the Code of 1857, but defining the territory as "comprising therein to the middle thread of the stream, in all river boundaries" and thereby expresses the same idea.

(9). In the Code of 1880, Secs. 21 and 23 is an adoption of almost the identical verbiage of the Code of 1857, *supra*.

(10.) Again: There was a re-adoption of almost the identical verbiage of the Code of 1857 in the Code of 1892, Sections 345, 347.

(11). The Code of 1906, Sections 403 and 405, also is a readoption of the Code of 1857.

The Constitution of Mississippi, of 1890, Section 3, *supra*, as, also, the Constitution of Arkansas, Section —, declare, that "all lands which were at any time heretofore a part of the State" shall continue to be a portion of the State.

(12). Riparian rights in Mississippi, were reviewed in **Archer v. Greenville**, 233, U. S., 60 where this Court said:

"Is the plaintiff the owner of the sand and gravel in the bed of the rivers.

"The law of Mississippi is an element in the case. It first found elaborate discussion and decision in **Morgan v. Reading**, 3 Smedes & M., 366, and it was held that the common law was adopted for the government of the Mississippi Territory, and that the line of the territory was the middle of the Mississippi River, and that it hence followed that the rights of riparian owners on the east shore must be determined in the State of Mississippi by the common law, and that it was a principle of that law 'that he who owns the bank,

owns to the middle of the river, subject to the easement of navigation' 3 Kent, Com. 5th ed., 427, and notes were cited.

"The case involved the right of the owner of the bank of the river to charge for mooring purposes on the river above low water mark. The right was sustained upon the principle which we have stated above.

"The same principle was announced in **Magnolia v. Marshall** 39 Miss., 109. The case was said by the court to be indetical in its facts with **Morgan v. Reading**. The opinion is too long to review, or to quote from at any length. It left no case or authority unreviewed, nor any consideration untouched, and carefully distinguished the public and private interest in the Mississippi, the Court saying: 'There is therefore, no inconsistency, but, on the contrary, as before suggested, perfect harmony between the **jus privatum** of riparian ownership in public fresh-water streams, to the middle of the river, and the **jus publicum** of free navigation thereof. The soil is granted to the riparian proprietor, subject to this public easement. And, again, in criticism of what the Court considered an untenable view expressed by the court in another state, it said: 'This general doctrine is as old as the Year-books, that **prima facie**, every proprietor on each bank of a river is entitled to the land covered with water to the middle of the stream.' This being declared to be the law of the state, judgment was entered for charges for the use by the Magnolia of a landing on the river.

"But it is said by the Gravel Company that according to the agreed facts 'there was no use or occupation' of the lands of the plaintiff in the case' beyond high water mark; the only portion used and occupied being the bank of the river between high and low water mark;' and that the

court, identifying the facts with those in the Morgan Case, said: 'What are the rights of the riparian owners, and what the **jus publicum** incident to the free navigation of the Mississippi, are questions there presented, and are the main questions here again presented.' This statement, it is hence contended, limits the binding authority of the opinions 'as judicial determination to a decision of what are the rights of a riparian owner between high and low water marks as connected with the rights of the public in using the Mississippi River as a public highway and navigable stream'. And it is further contended that the 'question is in no way connected with the ownership of the bed of the stream, or ownership of the gravel and sand in the channel of the stream.' It is therefore insisted that 'the case called for nothing more than a decision as to these bank rights, and if more was intended by the judge who delivered the opinion, it was purely **obiter**.'

"We cannot concur in this view. The Court deduced the right to charge for the occupation of the water between high and low water mark, from the ownership of the soil to the middle of the thread of the stream. The elaborate reasoning and research of the opinion were directed to demonstrate that under the common law of the state, riparian ownership extends **ad filum**, and, as a consequence, embraces the right to charge for the use of the water between high and low water marks for landing purposes, although not for the purposes of transit. The case is cited as having that purport in 3 Kent. Com. 14th ed. 427, where the doctrine of riparian rights as they obtain in the states of the Union is considered and cases collected. In the sixth edition of Kent, the *Magnolia* case is commended as 'a frank and manly support of the binding force of the common law, on which American jurisprudence essentially rests.'

See, also, **Shiveley v. Bowlsby**, 152 U. S. 1, 38 L. Ed. 331, 14 Sup Ct. Rep., 548, for a discussion by this court of riparian rights.

(13). "The **Morgan and Magnolia** cases were cited in **New Orleans M. & C. R. Co. v. Frederic**, 46 Miss., 1, 9, 10, to sustain 'the right of the owner of the land on the bank of the river to the thread of the stream, subject only to a right of passage thereon as a highway when the stream admits it.'

"It is further urged that the argument in the **Morgan** case 'in support of the common law doctrine as to the ebb and flow of the tide constituting a navigable stream is in direct opposition and antagonism to the reasoning and opinion of this court in the frequently cited and approved case of **Genesee Chief**, 12 How. 443, 13 L. Ed. 1058, decided in 1851, nine years before the opinion of the state court was handed down.' Other cases are also cited in which it is decided that riparian rights pertain to the bank, and distinguished, as it is asserted, between the rights admittedly riparian and rights of ownership of or to the bed of the river. We need not enter into a discussion of those cases, or assign their exact authority. This court has decided that it is a question of local law whether the title to the beds of the navigable rivers of the United States is in the state in which the rivers are situated or in the owners of the land bordering upon such rivers. **Packard v. Bird**, 137 U. S. 661, 34 L. Ed., 819, 11 Sup Ct. Rep. 210; **United States v. Chandler-Dunbar Water Power Co.**, 229 U. S., 53 L. Ed. 1063, 33 Sup. Ct. 667; **Kaukauna Water Power Co. v. Green Bay & M. Canal Co.**, 142 U.S., 254, 35 L. Ed., 1004, 12 Sup Ct. Rep., 173; **St. Louis v. Rutz**, 138 U. S., 226, 34 L. Ed. 941, 11 Sup. Ct. Rep., 337; **Shively v. Bowlby**, 152 U. S., 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548; **Hardin v. Jordan** 140 U. S., 371,

35 L. Ed. 428, 11 Sup. Ct. Rep. 808; **Jones v. Sou-
lard**, 24 How. 41, 16 L. Ed. 604."

It will be urged, doubtless, that the case of **Arkansas v. Tennessee**, 246 U. S., page 171, has repudiated any such doctrine, but it will be seen that in that case no reference is made to the Constitution of the State of Tennessee defining the boundary line of that State, and of the decisions of the State of Tennessee prior to that of **State v. Muncie Pulp Co.**, which did not go back, as does the Mississippi decision, to the year 1844. It was not expressly embodied in its constitution, and there is not a declaration of Tennessee adopted and approved by the legislature, coming from the most distinguished Chief Justice of that State, that this interpretation of the boundary line had been accepted since 1763.

So, as to the line in Mississippi, we submit that the decision must be in accordance with our Constitution, especially, when that Constitution coincides with the Constitutional definition made in the State of Arkansas.

(b) **The eastern boundary of the State of Arkansas.** This has been defined by its Constitution, since its admission into the Union in 1836, as "the middle of the main channel of the Mississippi," thus:

BOUNDARIES: We do declare and establish, ratify and confirm the following as the permanent boundaries of the State of Arkansas, that is to say: Beginning at the middle of the main channel of the Mississippi River, on the parallel of 36 degrees of North latitude, running thence West with said parallel of latitude to the middle of the main channel of the St. Francis River; thence up the main channel of the said last named river to the parallel of 36 degrees, 30 minutes of the North latitude, thence West with Southern boundary line of the State of Missouri to the

Southwest corner; thence to be bounded on the West to the north bank of Red River, as by Act of Congress and treaties existing January 1st, 1837, defining the Western limits of the territory of Arkansas, and to be bounded across and South of Red River by the boundary line of the State of Texas as far as to the northwest corner of the State of Louisiana; thence Easterly with the northern boundary line of the said last named State to the middle of the main channel of the Mississippi River; thence in the middle of the main channel of said last named River, including an island in said River known as "Belle Point Island," and all other land originally surveyed and included as a part of the territory or State of Arkansas, to the 36th degree of north latitude, the place of beginning." Kirby's Dig. Stat. Ark., Art. 1, p. 49.

These declarations are in the Constitution of the State of Arkansas, and the construction of a State Constitution is a question for the State Court, and not for this Court, provided especially, when Congress has given assent thereto, as was done in the law of 1909, *supra*. **Oil Co. v. Missouri**, 224 U. S., 270 **Martin v. West**, 222 U. S., 196; **Walton v. Maryland**, 218 U. S., 173; **Arkansas v. Louisiana**, 218 U. S., 431.

The interpretation of this constitutional provision came before the Supreme Court of Arkansas in (2) **Cesil v. State**, 40 Ark., 505; and we stress the proposition that this was an interpretation of its Constitution and involved, in the highest sense a decision as to its sovereignty and its jurisdiction under the construction in **Archer v. Greenville**, *supra*. This declaration is not from the legislature, or the governor, but it comes from the people, and is by the people, through its constitution, and is an interpretation by the Supreme Court of Arkansas, vested with plenary power in the premises, and by

this decision the eastern line of Arkansas is made to coincide with the western line of Mississippi.

While this line, so drawn by the respective Constitutions of the several states, as construed by their Supreme Courts, does not coincide with the line drawn by this Court in **Iowa v. Illinois** 147 U. S. 1, it is the line established by a construction of the Constitutions of these two states made by their several Supreme Courts, and by them at a time when there was ample authority so to do under the said Act of Congress. Their action was also impliedly approved by Congress (*infra*).

It will be noted that the last adjudication in Arkansas was in 1915.

Now this decision in **Cessil v. State** was approved in (3) **DeLooney v. State**, 88 Ark., 311; see also (4) **Wolfe v. State**, 104 Ark., 140; (5) **Kinnanee v. State** 106 Ark., 286, 290, where the Court said:

“The next assignment is that the Court erred in its declaration of law as to the boundary line between the States of Arkansas and Tennessee. The testimony shows that the sale occurred about 350 yards from the Arkansas shore in the stream of the river used for navigation. That from this point to a sandbar opposite the Arkansas bank is a half to three-quarters of a mile to the island a mile, and to the Tennessee Bank of the River a mile and a half or two miles; one witness thinking the island was the Tennessee shore. The island is submerged at a good stage of water.

“This court, in a well considered opinion, has already declared the law relating to our eastern boundary upon the Mississippi River, after reciting that the Act of Congress admitting the State to the Union, approved June 16, 1836, designated the eastern boundary as “the middle of the main channel of the Mississippi River,” which descrip-

tion is also embodied in our Constitution since that time, and, after a discussion of the meanings of the words 'channel' and 'main channel' said: 'The middle of the main channel then must mean the point or line along the river bed equidistant between the permanent and defined banks of the ascertained channel on either side.....It seems that the largest channel determines which is the river, and the central line of that makes the State boundaries.....Where there are several channels, the principal one is considered the river, and in that the **medium filum** makes the boundary. **Cessill v. State**, 40 Ark., 505.

"The Supreme Court of Tennessee has also considered and determined the matter of the Western boundary, which is the Eastern boundary of our State, in the case of **Tennessee v. Muncie Pulp Co.**, 119 Tenn., 47. It considered the boundary line fixed by the treaty of 1763, the middle of the Mississippi River, and the boundaries of the two States as fixed by the Acts of Congress admitting them into the Union, and in a well considered and exhaustive opinion, after reviewing this court's decision in **Cessill v. State**, *supra*, said: 'The decisions of all the courts of last resort of the several states, as well as those of the United States involving this boundary line, with the exception of those of **Buttenuth v. St. Louis Bridge Co.**, 123 Ill. 543, and **Iowa v. Ills.**, 147 U. S. 1; 202 U. S., 59, have been favorable to the contention that the line runs midway between the banks of the river, and it is only at a late day by those cases that a doubt was suggested or arose as to the true and correct line which formerly separated the British possessions in America from those of France and Spain, and subsequently a number of the largest and most influential States of the Union. The former construction has become a rule of property and should not be disturbed...

“Where a navigable river constitutes the boundary between two states, the middle of the channel separating their respective jurisdictions, both are assumed to have free use of the whole of it for the purpose of commerce. . . . The reasons for having a fixed, certain and visible line, such as the middle of the channel as measured from the respective banks of the river, we think greatly outweigh those advanced in support of the decision of **Iowa v. Illinois**. But the question has been settled by the duly constituted authorities of Tennessee and Arkansas by judicial decisions, legislative, and other authorized actions, long acquiescence, the exercise of jurisdiction unchallenged, and other acts amounting to an agreement or convention. The highest court of Arkansas, in a case to which the State was a party, and at its instance, in the assertion of its sovereignty, has defined the limit between the two states to be the line midway between the visible banks of the river, and enforced the criminal laws of the state up to that line. . . . Both states agree upon it as a true and correct line separating their territories, **and others cannot be heard to complain.** (*Italics ours.*)

“See also **St. L. I. M. & S. R. R. Co. v. Ramsey**, 53 Ark., 314; **Jones v. Soulard**, 24 How., 41; **Nebraska v. Iowa**, 143 U. S., 359; **Missouri v. Nebraska**, 196 U. S., 23; **Myers v. Perry**, 1 La. Ann., 372; **Morgan v. Reading**, 3 S. & M. (Miss.) 366; **Bridge Co. v. Dubuque Co.**, 55 Iowa, 558.

“The instruction given by the trial court was in accordance with the law as already declared by our court in the case of **Cessill v. State**, *supra*, and the boundary thus defined has been recognized and acquiesced in by the State of Tennessee, as the western boundary of that State, and the court did not err in giving said instruction.

“The undisputed evidence shows from the

Arkansas shore of the river to the sandbar opposite, which confined the stream upon which the boat was operating, was a distance of half to three quarters of a mile, that it was half a mile further to the island, and a mile from there to the Tennessee bank, and the sale was made not more than 350 yards from the Arkansas bank of the river.

“Unquestionably it occurred within the jurisdiction of this state, and the judgement of the lower court is affirmed.”

This declaration comes from the very highest Court in interpreting its own Constitution, and there can be no doubt that State was acting within its own right.

It is interesting to note that Mississippi, in the *Magnolia* case, followed Mr. Justice Story's decision in “*The Fame*,” 3 Mason, *supra*, and thereupon, Arkansas followed Justice Story by following the Mississippi Court in this decision.

(6). See, also **Hearne v. State**, 181 S. W. (1915), 291, where it is said:

“It is insisted that the Court erred in refusing Appellant's requested instructions embodying the legal principles as announced in his requested instruction numbered 4, and in giving instruction numbered 1, as follows:

“ ‘On the question of venue.....you are instructed that boundary line between the State of Arkansas and the State of Tennessee in the vicinity of the alleged crime, is the middle of the main channel of the Mississippi River as the same existed on the 16th of June, 1836, the date of the admission of the State of Arkansas and by the “middle line” of the channel of the Mississippi River is meant the equidistant point in the main channel of said river between the well defined banks on

either shore at said time, and all the water and lands which may now occupy the space between the middle line as same then existed and the Arkansas shore as same now exists is within the jurisdiction of the Osceola District of Mississippi County, Arkansas.'

"Said Instruction numbered 4 reads:

" 'Long acquiescence by one state in the possession of territory by another, and in the exercise of sovereignty and dominion over it, is conclusive of the title and rightful authority of the latter State. Therefore, if you find from the evidence in this case that the State of Tennessee for more than thirty years has exercised sole and exclusive jurisdiction, sovereignty and dominion over the place where the alleged crime was committed, and that the State of Arkansas has during that time acquiesced in the exercise of jurisdiction over the same, then the State of Tennessee has sole and exclusive jurisdiction over the territory where said crime was alleged to have been committed, and you will return a verdict of guilty.'

"The Court in its instruction numbered I also called attention to the testimony produced relating to the existence of a civil district of Tipton County, Tennessee upon Island 37, the establishment of polling places and holding elections thereon under the laws of said state, the assessment and collection of taxes upon real and personal property, and the exercise of jurisdiction by the courts of said county of Tennessee in civil and criminal proceedings against persons and property thereon, as well as testimony of the failure of the constitutional authorities of Mississippi County, Arkansas, to exercise jurisdiction thereon, and continued:

" 'This testimony is competent, and is to be considered by you, together with all the other facts and circumstances in proof bearing upon this

question of jurisdiction; but, if you find a preponderance of the evidence that the alleged crime was committed north of the middle line of the main channel of the Mississippi River, as it existed on the 16th day of June, 1836, at said place, the Osceola District of Mississippi County, Arkansas, has jurisdiction in this case, notwithstanding the exercise of the jurisdiction of the State of Tennessee thereon, and notwithstanding the failure of the legally constituted authorities of Mississippi County, Arkansas, to exercise jurisdiction over said territory heretofore.'

"(8) No mention was made of the law of Congress authorizing it, nor the statutes of Arkansas authorizing and permitting reciprocal and extended jurisdiction over offenses committed upon the Mississippi River to the west bank thereof by Tennessee and the eastern bank by the State of Arkansas.

"In **Kinnanee v. State**, 106 Ark., 286, 153 S. W., 262, this Court approved an instruction relative to the boundary line between the State of Arkansas and Tennessee, declaring the law in effect as given in said instruction No. 1 and quoted in the opinion, and holding a declaration of the Supreme Court of the State of Tennessee in **Tennessee v. Muncie Pulp Co.**, 119 Tenn., 47, 104 S. W. 437, of like effect, recognizing the boundary between the States to be as declared by the Supreme Court of Arkansas. No error was committed in the refusal of the said instruction numbered 4 and the others of like kind, for the State of Tennessee is making no claim of title herein to the territory upon which the offense was shown to have been committed, and as held in **Tennessee v. Muncie Pulp Co.**, *supra*, the States having agreed upon the true and correct line separating their territory, as announced in said instruction numbered one, others cannot be heard to complain."

We, therefore, have:

(a) A definition of the boundary of Mississippi as a sovereign state;

(b) A definition of the boundary of Arkansas as a sovereign State;

(c) An approval of this definition by Congress in the Act of 1909; approved by this Court in **Washington v. Oregon**, 214 U. S. 217, and under these circumstances, quite apart from what may be the true interpretation of the treaties, and what may be the line between other states of the Union, it is, nevertheless, true that as to Arkansas and Mississippi, the Constitutions of these two States fix a line, which line has been held to be equidistant from the banks, and these decisions of Arkansas and Mississippi construing the Constitutions of Arkansas and Mississippi, are conclusive upon this Court, under its decisions when the States agree under Congressional permission. The decision in **Butternuth v. St. Louis Bridge Co.**, 123 Ills., 543, *supra*, was rendered when the State of Illinois was not before the Court. That opinion saying:

“The remaining ground of relief insisted upon is, that part of the bridge structure, which lies west of its easternmost pier, is outside of the State of Illinois, and was illegally assessed and included in the assessment with that part which is confessedly within the limits of the State. On this branch of the case, some evidence was offered, and some discussion has been had, as to the boundary lien between the States of Missouri and Illinois at the point where the bridge structure spans the Mississippi River. That question is certainly one of great gravity, and one this Court will hardly undertake to determine on the meager evidence to be found in this record, and in

a case where **neither state is represented**, (*Italics ours*) and where there are no defendants other than private citizens, neither of whom had the slightest **personal** interest in the matter. The utmost this Court will assume to decide is, what part of the complainant's bridge is to be regarded within the State of Illinois, for the purpose of taxation, or what is the same thing, does the valuation of complainants' property, as made by the assessor for 1885, include any portion of the bridge not subject to taxation in this state? * * *

"Notwithstanding the fact the main channel of the river might be changed by imperceptible natural wear on one side, or by the gradual formation of alluvions, still 'the middle of the main channel,' when ascertained would be the boundary of the State. It might be a slightly shifting line, hardly perceptible; still it would be a well known and easily ascertainable boundary line."

"The rule of law is, when a stream dividing co-terminous states, being a boundary line, alters its channel by a gradual or imperceptible process of wear or of alluvions, the boundary shifts with the channel."

This may be true of Illinois or of Iowa, but it is not true of Mississippi, for the Constitution and laws of Mississippi, as interpreted by its highest Court, are to the contrary.

It is to be noted that the opinion refers to the Iowa case defining the channel as containing the best exposition of the law that the Illinois Court had seen, and that Court cited as authority, (a) the Mississippi decision of **Magnolia v. Marshall**, 39 Miss., *supra*, which is *contra*. (b) **Hadley's Lessee v. Anthony**, 5 Wheat., 374, which is demonstrated to be in favor of the Defendants in Error by Mr. Justice Story in "The Schooner Fame," and (c) **Thomas v. Hatch**, 3 Summer, 170, which is a charge to a

jury by Mr. Justice Story, and which does not in any way conflict with his opinion in the case of "The Fame."

I-(b)

This Court will not reverse the judgment of the State Supreme Court because, if *Iowa v. Illinois* 147 U. S. 1 were held to control, still upon the practical location by the States of Arkansas and Mississippi.

In ***Arkansas v. Tennessee***, 246 U. S., 172, there is a collection of the cases wherein this Court declared the circumstances existing upon the part of the several states which would amount to a practical location of the common boundary, (citing ***Rhode Island v. Massachusetts***, 4 How. 591; ***Indiana v. Kentucky***, 136 U. S., 479; ***Virginia v. Tennessee***, 148 U. S., 503; ***Louisiana v. Mississippi***, 202 U. S. 913; ***Maryland v. West Virginia***, 217 U. S. page 1) and thereby fix a boundary upon the principles of common action, and not as held in ***Iowa v. Illinois***, *supra*.

Turning, therefore, to the criteria thus prescribed we note:

(1). ***Rhode Island v. Massachusetts***, 4 How., 591, where, at page 636, it was declared:

"The charter is of doubtful construction, and may, without doing violence to its language, be construed in favor or against the proposition of Complainant."

So, too, the treaties in question are of doubtful construction as is evidenced by the two conflicting lines of decision ante-dating ***Iowa v. Illinois***, *supra*.

It will be further noted, as said in that case at page 638:

“This dispute is between two sovereign and independent States. It originated in the infancy of their history, when the question in contest was of little importance. And, fortunately, steps were early taken to settle it, in a mode honorable and just, and one most likely to lead to a satisfactory result. There is no objection to the joint commission in this case, as to their authority, capacity or the fairness of their proceeding. An innocent mistake is all that is alleged against their decision. And as has been shown, this mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey Station. But if the mistake were admitted as broadly and fully as charged in the bill, could the court give the relief asked by the complainant?

Again, at page 638, it is said:

“The possession of the respondent was taken not only under a claim of right, but that right in the most solemn form has been admitted by the complainant and by the other colonies interested in opposing it. Forty years elapsed before a mistake was alleged, and since such allegation was made nearly a century has transpired. If in the agreements there was a departure from the strict construction of the charter, the commissioners of Rhode Island acted within their powers, for they were authorized ‘to agree and settle the line between the said colonies in the best manner they can, as near agreeable to the royal charter as in honor they can compromise the same.’

“Under this authority, can the complainant insist on setting aside the agreements, because the words of the charter were not strictly observed? It is not clear that the calls of the charter were deviated from by establishing the station of Woodward and Saffrey. But if in this respect

there was a deviation, Rhode Island was not the less bound, for its commissioners were authorized to compromise the dispute. Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in the case of disputed boundary."

In the instant case, the States each adopted by their respective Constitutions, the interpretation of the treaties which they deemed proper. These constructions have been uniform, the one since 1817, and the other since 1836, and each State under repeated judicial decisions has laid claim to that territory which is described in and by the several Constitutions, as that to which each was entitled and no more.

What could be more just, or of greater effect than to divide the property, which has been only in constructive possession by reason of the character of the land, in accordance with the claims of the respective sovereign, independent states?

As we read this record, neither Arkansas nor Mississippi has either done anything inconsistent with the practical interpretation placed by them upon these treaties by their respective Constitutions, and certainly nothing can be more solemn than a compact of the people, evidenced by their fundamental law, which defines

this boundary, and which definition has been confirmed by numerous judicial decisions in each state.

(2) **Indiana v. Kentucky**, 136 U. S. p. 479. At page 508, the Court declared:

“Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two states. **That, however, is a matter for arrangement and settlement between the States themselves, with the consent of Congress.**” (*Italics ours.*)

Here we have such consent evidenced by the Constitution, which, under this decision, is conclusive.

Urged against this practical construction of the several Constitutions, we have the testimony of expert witnesses, and in that decision this Court dealt with the declarations of such witnesses, thus: “aside from the speculations of geologists, which are not of a very convincing character, the evidence consisted principally of the recollections of witnesses, which were more or less vague and imperfect. Apart from those speculative theories, she produced no evidence that at the time the cession was made by Virginia to the United States in 1784, or when Kentucky became a state, the tract was attached to and formed a part of the territory then ceded out of which the State of Indiana was created, or that the waters of the Ohio did not run between it and the main land of Indiana so as to justify its designation as an island in the river.”

In the instant case, we have the same speculations as to what may have been, or may not have been the channel. We have some testimony, clouded by the mists, which necessarily attends transactions, going back nearly seventy-five years.

As was said in the same case, quoting **Vattel**:

“The tranquility of the people, the safety of states, the happiness of the human race do not allow that the possessions, empire and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title.”

And here we apply, with great force, the declarations of this Court:

“The facts as they existed at the time of the cession of Virginia to the United States in 1784, and even at the time of the admission of Kentucky into the Union, have long since passed beyond the memory of man, and therefore cannot be established by oral testimony. As counsel says, the very grandchildren of men then living are now hoary with age. The facts can only be established as a matter of inference from general facts in regard to the condition of the country, and documentary evidence which in many cases rises little above that of hearsay, such as notices by travelers and maps given by them indicating the position of the tract in question. Of the latter it may be said that they all represent the tract as an island in the river.”

So, here, these facts to overcome the practical interpretation, are mere speculative fancies and do not in any way prove that which is requisite in the premises. The reason therefor is accurately set forth in that same case:

“Great changes in the bed of the river were to be expected from the immense volume and flow from its vast water-sheds. These water-sheds, ac-

according to the official report of the Tenth Census of the United States, cited by counsel, comprise over two hundred thousand square miles, and more than half of the water from them comes from east of Green River Island, and nearly all the great water courses find their way to the Ohio River. That vast changes should be made in the channel of that river from the volume of water thus received, and its impetuous flow at certain seasons wearing away its banks, deepening some portions of the stream and filling up others, was not surprising; and that where large vessels at one time could easily float should have become dry ground many years afterwards was but the natural effect of the tremendous force thus brought into operation."

And so, here we have the changes necessarily incident, and in addition to those mentioned is that which came from the construction of the Mississippi Levee that necessarily forced a swifter current through this old lake than would otherwise have been the case.

Note, also, that the waters running across this territory had but a short distance to go before they flowed into the Mississippi again at a lower point, and that there would be a natural cut off through the channel beginning immediately south of Friars Point and running down to the river at the point in Section 11, Township 28, Range 5, where the water would break into the river again near the tow head there delineated.

(3). **Virginia v. Tennessee**, 148 U. S., 503, is directly controlling in this aspect. That was a suit to establish by judicial decree the true boundary line between Virginia and Tennessee. There the original jurisdiction was sought by Virginia and Tennessee promptly responded, and the nature of the controversy was set out in full. A line was run and this line "was accepted by both states

as a satisfactory settlement of a controversy which had, under their Governments and that of the colonies which preceded them, lasted for nearly a century. As seen from the acts recited, both states through their legislatures declared in the most solemn authoritative manner that it was fully and absolutely ratified, established, and confirmed as the true, certain and real boundary line between them, and this declaration could not have been more significant had it added in express terms what was plainly implied, that it should not be departed from by the governments of either, but should be respected, maintained, and enforced by the governments of both. All modes of legislative action which followed it indicated its approval. Each state asserted jurisdiction on its side up to the line designated, and recognized lawful jurisdiction of the adjoining state up to the line on the opposite side. Both states levied taxes on the lands on their respective sides and granted franchise to the people resident thereon. The courts of the two states exercised jurisdiction, civil and criminal, on their respective sides, and enforced their process up to the line, and the legislation of Congress in the designation of districts for the jurisdiction of Courts and in prescribing limits for election districts and for puposes of election made no exception to the boundary as thus established."

In the instant case we have (a) establishment of the line by the Constitution; (b) there were no inhabitants of the territory by reason of its character; but (c) the Courts of Mississippi and of Arkansas recognized the true dividing line in their respective decisions; and (d) Congress not only expressly authorized the adjustment, but passed all of those acts which are referred to in the Virginia-Tennessee case as approving it by implication.

Still this line was not actually laid out, yet the principles of law which were to govern in its demarcation were clearly set forth by Mississippi, wholly apart from any concurrence with Arkansas, and by Arkansas, wholly apart from and without any concurrence of Mississippi.

In short, each acted by its Constitution without reference to action by the other, and as said in that case,

“Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in **Penn v. Lord Baltimore**, 1 Ves. Sr. 444, 448; **Boyd v. Graves**, 17 U. S., 4 Wheat, 513; **Rhode Island v. Massachusetts**, 37 U. S. 12 Pet. 657, 734; **United States v. Stone**, 69 U. S. 2 Wall, 525, 527; **Kellog v. Smith**, 7 Cush., 375, 382; **Cheney v. Waltham**, 8 Cush. 327. **Hunt Boundaries** (3rd Ed.) 306.”

Again, in that same case:

“But to this position, there is in addition to what has already been said, a conclusive answer in the language of this court in **Pool v. Fleeger**, 36 U. S., 11 Pet. 185, 209. In that case Mr. Justice Story, after observing that ‘It is a part of the general right of sovereignty belonging to independent nations, to establish and fix the disputed boundaries between their respective territories, and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundary’ adds: ‘This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So

far from there being any pretense of such a general surrender of the right, it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress.' The Constitution in imposing this limitation plainly admits that with such consent a compact as to boundaries may be made between two States; and it follows that when thus made it has full validity, and all the terms and conditions of it are equally obligatory upon the citizens of both States."

This action of Mississippi and Arkansas has received the same sanction that was pointed out in the Virginia-Tennessee case, and in addition, an express ratification by Congress, which is conclusive in the premises.

It is very doubtful whether there is any agreement between Arkansas and Mississippi within the terms of the prohibition of the Constitution. The line was in doubt. Independently of Arkansas, Mississippi defined the line; then independently of Mississippi, Arkansas defined the same line. There was no joint action. Each State claimed, and claims jurisdiction to the same line, by their Constitutions without reference to any agreement with its sister State. With deference, we submit that it does not come within either the reason or the prohibition of the Constitution. **Virginia v. Tennessee, Supra.**

(4). In **Louisiana v. Mississippi**, 202 U. S., at page 53, this Court said:

"Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

"The question is one of boundary, and this court has many times held that, as between the states of the Union, long acquiescence in the asser-

tion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both. **Virginia v. Tennessee** 148 U. S., 503, 37 L. Ed. 537, 13 Sup. Ct. Rep. 728; **Indiana v. Kentucky**, 136 U. S., 479, 34 L. Ed., 329, 10 Sup. Ct. Rep. 1051; **Missouri v. Kentucky**, 11 Wall. 395, 20 L. Ed. 116; **Rhode Island v. Massachusetts**, 4 How., 591, 11 L. Ed. 1116."

Here, Arkansas has never yet constitutionally disputed the claim of Mississippi. Its Constitution fixed this line, and being the supreme law of the State of Arkansas, there is no one who can dispute that which constitutes a part of this fundamental law, and this fundamental law is binding upon all parties to its creation, just as is the fundamental law in Mississippi to identically the same effect. The case in question is a far stronger case than that decided against Mississippi in favor of Louisiana.

(5). In **Maryland v. West Virginia**, 217 U. S., 1, there was a controversy as to the boundary line between Maryland and West Virginia, and it there appeared that the contention of Maryland with reference to the headwaters of the Potomac was correct; but that, notwithstanding the line had formerly been run for years from the so-called Fairfax stone, and notwithstanding the terms of the treaty gave title to the so-called Potomac meridian, yet this Court gave title under the practical interpretation placed thereon by the parties.

What could be more important than to establish it in the present case? And as said in Wheaton on International Law:

"The writers on natural law have questioned how far that peculiar species of presumption arising from the lapse of time, which is called prescription, is justly applicable as between nation and na-

tion; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. Pt. 2, Chap. 4, Sec. 164."

So that, in that case we have (a) the Constitution of two States: (b) numerous decisions of each State, heretofore set forth; (c) a ratification of the principles governing the line uniformly through this period of years, and where the property is subject to annual overflow to determine under the decisions of this court, the line between these States. We submit that, even though the treaties may have located the line according to the decision of **Iowa v. Illinois**, *supra*, a practical interpretation thereof will be made, and the line will be controlled by the actions of the States who are alone thereby affected.

I-(c)

This Court will not reverse the judgment of the State Supreme Court because the record shows a case wherein the party upon which the burden of proof rested failed to meet it, and without application for continuance, judgment was rendered.

This controversy is between the States in their sovereign capacities, and where they have each established a rule delineating the identical line as their respective boundaries, then that line, so thus delineated, should, if possible, be followed.

Avulsions do not operate to change the boundaries of the respective states. In **Arkansas v. Tennessee**, 246 U. S., 173, it is said:

“It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors; namely, that when the bed and channel are changed by natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. **New Orleans v. United States**, 10 Pet. 662, 717, 9 L. Ed. 573, 594; **Jeffries v. East Omaha Land Co.**, 134 U. S. 178, 189, 33 L. Ed. 872, 876, 10 Sup. Ct. Rep. 518; **Nebraska v. Iowa**, 143 U. S., 359, 361, 367, 370, 36 L. Ed. 186, 187, 189, 190, 12 Sup. Ct. Rep. 396; **Missouri v. Nebraska**, 196 U. S., 23, 34-36, 49 L. Ed. 372, 374-376, 25 Sup. Ct. Rep. 155.”

(1). The cases there cited are uniform in so holding. In **Iowa v. Illinois**, 147 U. S., 1, quotes, to approve, Wheaton's Elements of International Law, (8 ed.) thus:

“And in Section 202, while thus stating the rule as to the boundary line of the Mississippi River for the middle of the channel, states that the channel is remarkably winding, crossing and re-crossing perpetually from one side to the other of the general bed of the river.”

(2). And, again, in that same opinion is quoted from **Dunleith, etc. v. County**, 55 Iowa, 564, thus:

“The course of navigation, it is said, which follows what boatmen call the channel, is extreme-

ly sinuous, and often changing, and is unknown except to experienced navigators. * * * The center of this river channel may be readily determined while the center of the navigable channel often could not be known with certainty. The first is a fit boundary line of a state; the second cannot be."

There are thus laid down two principles (a) the sinuosity of this channel; (b) its constant and persisting change.

In addition, there is a third element which must be integrated into the equation, viz, What is the character of navigation that is to control? It begins with the Indian floating in his birch bark canoe, and ends with the tow boats bringing down their immense cargoes to the mouth of the river, and between the two is the period of floating palaces upon the river.

The channel of commerce in 1817 controls. **Washington v. Oregon**, 211 U. S. *supra*; S. C. 214 U. S. *supra*.

So that between the period of 1763 and the present day, there have been most marked changes in the character of navigation. The powerful agency of steam has been brought into subjection, to be succeeded, possibly, by that of gasoline or electricity. So that, in order to determine the channel of navigation, both the time and the place and the circumstances must be considered.

This Court is asked to fix, as of the date of an avulsion, the time of which is uncertain to the extent of possibly ten years, the channel of commerce at a definite point.

There can be no dispute but that at some time the current of the Mississippi River did run at the south point of Horseshoe Island close to the Mississippi shore,

but what was that course when it cut through the center of Section 10? There is no living witness who can say with certainty.

Turn to the field notes of Section 10, Township 4, Range 4, in Arkansas, and it will be seen: (**Arkansas v. Mississippi**, Original No. 7.)

That across that fractional township in Section 10 the meander line of the river at the east side (Tr. page 655, bottom) shows a most marked concave surface, indicating that at that point there was a cutting of the river.

Note the meander line at S. 12° West 20.55 chains (note the error on the plat as to 45-100); thence S. 5° West 11.50 chains; thence S 15° East 30 chains, the contour of which is evidently by the plat annexed. The extent of the angle is further manifested by said plat.

Note, further, that shortly north of the center of Section 10, which is only approximately 40 chains across, there is a bayou running from East to West only about a quarter of a mile north of the center of said Section 10.

Then note further that on the west side of this narrow strip the meander line shows (p. 659); thence up the river through Section 10, Township 4, S., Range 4, E. 60 ch. S. 7° , W. 21 ch. to the corner of fractional Sec. 10 and 15.

It will appear that both sides of this fractional section were concave, evidencing the fact that there was at that date the influence felt of the Mississippi River upon the banks. They do not appear in this cause.

Add the location of an island in Mississippi four chains off shore, (which it is testified can be located with comparative ease by one witness) midway between

Sections 30 and 31 of Township 29, Range 4 West, showing that in 1835 the current of the stream was on the opposite shore; and then notice that all of the original timber upon the island has been washed away east of a certain line; and then notice, further, that the Mississippi river in Township 28, Range 5 West, runs north, and then runs south again; so that at the point in question opposite the Horseshoe Lake the entire distance between the Mississippi River is covered by less than two and a quarter miles, and that in this two and a quarter miles the transcript shows lakes existing of two chains, (Tr. 704) and 4 chains (Tr. 704) the outline of which may be seen upon the plat annexed; and then bear in mind the constancy of the change in the currents due to the conditions up the river; and then note the rule as stated in **Illinois v. Iowa**, 147 U. S., 8, quoting to approve Creasey in his First Platform on International Law, thus:

“It has been stated that where a navigable river separating neighboring states, the thalweg, or middle of the navigable channel forms the line of separation. Formerly a line drawn along the middle of the river, the **medium filum aquae** was regarded as the boundary line; and **still will be regarded prima facie as the boundary line**, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the **medium filum**. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation.” (Italics ours.)

Furthermore, as was said in the same authority, quoting to approve Halleck in his Treatise on International Law,

“But the deeper channel may be less suited,

or totally unfit for the purpose of navigation, in which case the dividing line will be in the middle of the one which is best suited and ordinarily used for that object.”

Now, in the instant case, under this decision there is a *prima facie* presumption that the boundary line coincides with that prescribed by the Constitutions of Arkansas and Mississippi as interpreted by their Supreme Courts, and there is no proof what ever that the deeper channel, if such it was at the time of the avulsion, as to which there is no proof, was the better suited for navigation.

With the utmost confidence, we, therefore, submit the rule to be, that the presumption of fact obtains until the party upon whom the burden of proof rests shall have met it by showing facts to the contrary, and by evidence of sufficient weight to overcome the presumption.

Again, in **Arkansas v. Tennessee**, 246 U. S. 177, this principle is directly recognized in paragraph 5, p. 177, when the Commission appointed to locate that line were directed to ascertain “the nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion in 1876, and the question whether it is practicable now to locate accurately the line of the river as it then run.” And this question was referred “to said Commission, subject to a review of its decision by this Court, if necessary.”

In pursuance of that decision, an interlocutory decree was rendered, 247 U. S., 462, where the decree recites:

“In the event the said commission cannot now locate with reasonable certainty the line of the

river as it then ran, that is, at or immediately before the avulsion of 1876, it shall report the nature and extent of the erosions and accretions that occurred in the old channel and prior to its abandonment by the current as the result of said avulsion, and in said report, if necessary to be made in obedience to this paragraph of the decree, said commission shall give its findings of fact and the evidence on which the same are based."

It will thus be seen that in this instance this Court reverted to the principle of *Iowa v. Illinois*, *supra*, and approved the doctrine that where the proof is not clear, the presumption is not overcome, and the channel will be located in accordance with the Constitution of the several States.

This rule is laid down in *State v. Keane*, 84 Mo. App., 130, where it is said:

"The sole question for decision is, in which State was defendant's saloon located when the sale was made. The case was submitted to the Circuit Court on an agreed statement of facts whereby it appeared that prior to the year 1881, the Missouri River at the place in controversy, made a bend in the shape of a horseshoe, with the toe pointing to the north and the heel to the South. In that year the high waters caused the river to suddenly change its course, and to cut directly across the heel of the shoe instead of flowing around the bend as formerly. The old course was abandoned by the stream and left a bed or tract of dry land.

"And it is in this old bed of the river that defendant's saloon was located. The navigable stream at this point was next to the Missouri shore * * * If the middle of the old river, to

measure from bank to bank, is the boundary line between the two states, as contended by the prosecuting attorney, then the sale was made in Missouri, and the defendant was rightfully convicted. The question involved here is one of great importance."

There is a review of many of the pertinent decisions, with the conclusion of the Court thus stated:

"But the expression that the boundary will remain in the center from bank to bank of the old river bed is correct in all those cases where no showing has been made of where the navigable channel was. For, in the absence of proof on that subject, it will be taken to be in the center of the old bed located from bank to bank. Creasey's First Platform on International Law, Section 231; *Iowa v. Illinois supra*."

In order to overthrow the **prima facie** presumption, which favors the constitutional line, something more than conjecture is required. This presumption is **prima facie** evidence and exists until fully and completely rebutted by proof.

That proof does not exist in this record.

In *Moore v. McGuire*, 205 U. S., 214, it was held that "evidence which goes no further than to raise a doubt as to whether the main channel of the Mississippi River has not at different times varied from one side of Island 76 to the other will not support a finding that this channel ran to the west of the island when Mississippi was admitted to the Union, and was, therefore a part of that State, when such finding is opposed by the testimony from memory and tradition, by the presumption from the establishment of the channel

on the east side for a time running back nearly or quite to the admission of Arkansas, and by consensus of action on the part of the two States concerned and the United States.”

An examination of that opinion shows that there was a finding of fact made by the District Judge, and this finding of fact was reversed by this Court, notwithstanding there was to be found, as said by this Court, that a map in Samuel Cummings, *Western Navigator*, Philadelphia, 1822, Vol. I, indicated the channel on the Arkansas side, and that in the *Navigator of Zadak Kramer* it so showed for the year 1817, “that the channel was good on both sides”—the very year that Mississippi was admitted into the Union.

Now the map of 1821 which is introduced and relied upon by the complainant in Original No. 7, was expressly referred to in that opinion thus (p. 222):

“As against this consensus of action on the part of the two states concerned and of the United States (which we have here in the instant case, under an Act of Congress and the Constitutions of Arkansas and Mississippi) this presumption formed the establishment of the channel for a time running back nearly or quite to the admission of Arkansas; and this testimony from memory and tradition.”

“The chief reliance of the defendants is upon certain maps and statements in a letter to which we shall refer.

“The first and most important of the maps is one of ‘a reconnoissance of the Mississippi and Ohio Rivers,’ made during the months of October, November and December, 1821, by two captains and a lieutenant of engineers under the direction of the Board of Engineers. This exhibits Chateau Island with a dry sandbar on the Mississippi side,

and indicates by dots that the channel is to the west. If the distances are accurate the sandbar at the top approaches pretty near to Mississippi; but in view of the small scale of the map and the absence of measurements, there is no sufficient warrant for assuming that the distances are accurate.

“As to the indication of the channel, it would not be surprising, considering the short time during which the reconnoiter extended, if it had been determined by nothing more than the visible width. **But in any event it hardly would do more** than confirm a conjecture suggested by other sources which we shall mention, that in some years the western passage was as good or better than the more permanent one to the east.” (*Italics ours.*)

Thus, this Court has directly passed upon this map of 1821, which was made the predicate of so much of the testimony, and has held that it was not of sufficient probative force, when supported by far stronger evidence than occurs in this record, upon which to base a finding of fact.

Now in the Moore case, the Appellee had (1) this map; (2) a map of January 2, 1829 showing the Arkansas shore sectionized, and which map could be made the subject of speculation, but without material aid to either side; (3) a map of Benjamin Griffith showing the land divided up as a part of the township in Mississippi, and containing other slight indications that the draftsman recorded the island as belonging to Mississippi. It is true there was another map which somewhat counteracted this, by the same party; (4) there is, in addition, considerable correspondence between the Department at Washington and the State of Mississippi, wherein this contention was sustained; and, finally (5) there is Samuel Cummings' Western Navigator, and the Navigator

published by Zadok Kramer, making a similar showing, and yet, this Court reversed the decree of the lower court, and held that this map of 1821, when supported by these other and numerous circumstances, was not sufficient evidence upon which to found a decree contravening the solemn action of the States; and, may we add, in this case, of the people of the States taken in their fundamental law, their Constitutions, and concurred in, in one case as declared by its Chief Justice, for over a century, and the other since its admission to the Union in 1836.

Given these factors, (a) the character of navigation; (b) the sinuosity; (c) its constant change,—there is in this record no evidence which ought to overcome the *prima facie* presumption that the line is equidistant between the fixed banks of the Mississippi River?

Given, also, the evidence of the principal witnesses, negroes who lived in the vicinity, and by whom, on cross examination, complainant proved (p. 171) that this washing of the old river occurred in 1857, during the high water in July.

But the trouble does not stop here.

In 1816, a large island is shown at the foot of that which was Township 4, Range 4, East, in Arkansas, and this island seems to contain, from the plat record, at least 160 acres of land, and not to have been a part of Sections 22 and 23; but the total acreage is given, upon the exhibit, as 1504.18, which is made up of acreage in Section 2, 156.23; in Section 10, 431.78; in Section 14, 323.63; in Section 15, 375.90; in Section 22, 56.23; in Section 23, 12.07. (See Plat in No. 171, page 283.)

It thus appears clearly that the island in question was not sectionized, nor was its area included in the area assigned to the State of Arkansas by the survey made by the United States.

An examination of the channel of the Mississippi River shows that the channel which lies on the north side of this island was the wider, and it further shows that it was concave throughout nearly its entire length, thus indicating deep water and the influence of the current upon the bank, and it was very much easier to navigate than the channel which ran around this island, and, if time was to be conserved and convenience consulted, a boat would run to the north rather than to the south.

In **Missouri v. Kentucky**, 11 Wall., 395, this Court, speaking of the treaties declared:

“And this line established by the only sovereign powers at that time interested in the subject has remained ever since as they settled it. It was recognized by the treaty of peace with Great Britain in 1783, and by different treaties since then, the last of which resulted in the acquisition of the territory of Louisiana. . . . The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis, as were those of Arkansas in 1836, and Kentucky succeeded in 1792 to the ancient right and possession of Virginia, which extended, by virtue of these treaties, to the middle of the bed of the Mississippi River, and it was held that Wolf Island remained a part of Kentucky, even though the main channel did shift to the east thereof.

This rule was reaffirmed in **Indiana v. Kentucky**, 136 U. S., 479.

So that, if this island belonged to Mississippi in 1817, its title thereto, if it still continued to exist, was not divested, and accretions forming therefrom would belong to Mississippi and not to Arkansas.

What the subsequent developments with reference

to this island are, there is no proof whatever in this record, nor is there any proof as to the line at the beginning and ending of the old channel. This island may have, and doubtless did, under the influence which washed away so much of the point of Section 23, have moved to the West considerably, and in so doing have perpetuated Mississippi's title and claim; but these developments are now all clouded by the ever moving current of time, and the presumption to be indulged will do justice to each by dividing equally that which is sought to be partited. Whereas to follow the alleged line claimed for the State of Arkansas would be to award practically nothing to Mississippi, and to give to the State of Arkansas many thousands acres of land, upon a conjecture that does not overcome the presumption to the contrary.

The claim of Arkansas is that Horseshoe Island contained a fraction over 4000 acres. This claim is not supported by the evidence.

The land, constituting all of "Horseshoe Island," was at one time owned by Mr. Thomas W. Stringer, who died, as shown by Transcript, p. 363, intestate, in 1893, leaving as his widow, Lydia A. Stringer, and it is averred that at his death he owned all that tract of land known as "Horseshoe Island" and more particularly described as follows: All of fractional Section 2, except, the North half of the Northwest quarter; all of fractional Section 3; all of fractional Section 10; all of fractional Section 14; all of fractional Section 15; all of fractional Section 22; all of fractional Section 23, all in Township 4, Range 4, and with accretions, containing 808.42 acres more or less.

Under the Arkansas statute (Code of Arkansas 1894, secs. 192-195) when lands are sold for debt, they must be appraised and viewed by the appraisers, and George Walker, S. I. Clark and W. H. Stone (Tr. 386) appraised this land at \$1.50 an acre, and fixed its quan-

tity as **808.42** acres, and it was actually sold on this basis to W. A. Rust (Tr. 369.)

Add to this 808.42 acres the North half of the Northwest quarter of Section 2, and this would amount to one-half of 119.78 acres or 59.89 acres, which added to 808.42 would give a total area of "Horseshoe Island," claimed by said Stringer, under his rights in Arkansas, of, not exceeding, 868.31 acres.

It is true that the Rust Land and Lumber Company paid taxes in Arkansas upon an acreage somewhat in excess of this, but this does not alter the fundamental fact that the owner of all Horseshoe Island, with the accretions, claimed as the extent of that ownership this amount of acreage, and that Rust took title on this basis.

Given the necessary cutting away by the river, there was a fixation by the owner of the amount which remained at less than 900 acres. How he arrived at this aggregate is now unknown to any person, and can only be guessed. But that, actuated by ownership, he should have claimed only this amount, is a potent circumstance of far reaching meaning. So, how this figure of 4000 acres was arrived at is left to conjecture.

With a **prima facie** presumption, can it be said that the presumption has been overcome by evidence?

I-(d)

This Court will not reverse the judgment of the State Supreme Court, because the extent of the ownership of the Plaintiff in Error stopped at Highwater mark upon the Arkansas Shore.

The affirmance of the judgment of the Supreme Court of Mississippi was in accordance with its rules and practice.

Rule 11 of the Supreme Court of Mississippi provides: "No judgment shall be reversed on the grounds of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless it shall, affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."

If the right result was reached in the court below, the judgment will be affirmed, even though it was reached by wrong methods, or even by accident. **Insurance Co. v. Bank**, 71 Miss. 608. Errors of law will not reverse where, upon appellants own showing, the judgment was manifestly right. **Bell v. Medford**, 57 Miss. 31. The judgment will not be reversed for an erroneous charge, if it be manifest that the correct result has been reached. **Dozier v. Ellis**, 28 Miss. 730; and the giving of an erroneous instruction is no ground for setting aside the verdict where it is clearly right upon the law and the facts. **Wiggins v. McGimpsey**, 13 Sm. & M. 532; **Head's Case**, 44 Miss. 731; **Evan's Case**, 44 Miss. 762. A verdict will not be set aside where it is apparent upon the whole record that verdict is right on the facts. **Hill v. Calvin**, 4 How. (Miss.) 231; **Pritchard v. Meyers** 11 Sm. & M. 169.

The affirmance by Supreme Court, irrespective of the instructions given or refused, in the trial court, was correct.

The Supreme Court of Mississippi reviews the entire record, and looking back over a completed trial determines the correctness, *vel non*, of the judgment. If the instructions, whereunder Plaintiff in Error was awarded the accretions in Arkansas after the avulsion, are incorrect, should the Supreme Court have closed its eyes to the error therein? That it did not do so is manifest by its decision in the light of the briefs, certified to this Court, and filed as an appendix to our principal brief.

(a) The right of the Plaintiff in Error, under the Arkansas decisions, never attached to the soil below the high water mark—the bed of the stream being held forever by the State in trust for its citizens. **State v. Parker** 132 Ark 321; **Barboro v. Boyle** 119 Ark. 383; **Railway v. Ramsey** 53 Ark. 314; **Wallace v. Driver** 61 Ark. 429. This rule has been recognized by this Court. **Arkansas v. Tennessee** 246 U. S. 176.

(b) Avulsion fixed irrevocably the interstate boundary, and it is not thereafter altered by accretion, even though there appear dry land in the former bed. **Arkansas v. Tennessee** 246 U. S. 173; **Cissna v. Tennessee**, 246 U. S. 296; **State v. Pulp Co.** 119 Tenn. 47; **Stockley v. Cissna** 119 Tenn. 135 (both approved upon this point by this Court); **Nix v. Pfeifer** 83 S. W. 951; **Cessill v. State** 40 Ark. 504; **Nebraska v. Iowa** 143 U. S. 361; **Missouri v. Nebraska** 196 U. S. 33; **New Orleans v. United States** 10 Pet. 662.

There is not a decision which we have found that, after an avulsion, conferred title in the former bed by accretion; certainly not any in this Court or controlling in this cause.

(c) The record in this case is destitute of proof as to (1) The location of the high-water mark upon the Arkansas shore in 1848; (2) of the thread of the stream at the time of such avulsion; and (3) of any fact or factor which would cause the line to be run otherwise than in accordance with the line equidistant from the fixed banks under the decisions in **Iowa v. Illinois**, 147 U. S. 1. There is no attempt at fixing the steam boat channel, or to show that the steam boats were the means of transportation which were to fix the channel of commerce in 1817. If, when Mississippi was admitted to the Union in 1817, the channel of commerce would have been fixed by the course pursued by the flat boats, then, upon the subsequent introduction of the newer method of water transportation

by steam boats, there would not be a relocation of the line to conform, **Washington v. Oregon** 214 U. S., 205; S. C. 211 U. S. 127.

There is no proof whatever that, at the time of the avulsion, the channel had changed from the middle of the river, or that the alleged channel was in any way suit-

able for navigation. **Iowa v. Illinois** 147 U. S. 9. Plaintiff in Error with the burden of proof resting upon him to show ownership, to justify his wanton trespass in taking possession, wholly failed to meet this burden of proof.

(d) There was a complete failure to trace title with reference to the Island shown off the Arkansas shore in 1817. That court declaring in **Cessill v. State**, 40 Ark. 504:

“For if the main body of water were to find a new channel and abandon the old one, leaving intervening lands in a natural state, the old boundary would be still ascertainable, and would govern. This has been decided in the case between Kentucky and Missouri (*infra*, 11 Wall 395), and results, with regard to surveyed lands, from the additional clause above noted, in the Constitution of 1864. It seems that the largest channel determines which is the river, and the central line of that makes the boundary.”

Under the Constitutions of both Mississippi and Arkansas, whatever was once a part of the State continues to be a part of the State, notwithstanding a change in the channel of the river. Both States, with the permission of Congress, have so ordained, and under this declaration, there could be no question that the portion of land where from the timber was cut, as it was actually surveyed by the United States as a part of Mississippi. and so delineated upon the official map, was and continued to be in Mississippi. Especially, when that portion is now above

water by reliction, and has been located and claimed by the Mississippi owner for a long period of years.

Plaintiff in Error occupies the attitude of one having title to 68 acres of land, assessed at a valuation of \$275.00 demanding title to some 4000 acres, as an accretion, and which has not been taxed. This would be proper, if it was still the property of the State, and wholly improper if it was the property of the Plaintiff in Error. It might well be claimed that Plaintiff in Error thereby was precluded from asserting title by the maxim **nemo allegans suam turpitudinem est audiendus**. If the property belonged to the State, it was not taxable; if to the Plaintiff in Error, it was taxable, and what could be a stronger circumstance to show that Plaintiff in Error did not have title below the high water mark than for a period of nearly twenty years it had made no return of this property for taxation. It is not unjust to admeasure its protection from the State by the performance of its duty to the State.

(e) The emergence of dry land in the former channel of the river, after avulsion, does not constitute accretion. **Stockley v. Cissna** 119 Tenn. 152. See, also, cases collated hereunder under (b).

(f) As said in the Cissna case: "Its location in 1823 may be said to be a conceded fact. Every presumption is in favor of the permanency of the location of such lines. It is of the highest importance that their location should be certain and fixed. When a claim is made that a line of this character has been changed by the forces of nature, it must be supported by the clearest and most satisfactory evidence." This is a sound principle.

It is shown in this case at bar that in recent years there has been a considerable change in the amount of water in Old River due to the formation of a bar in front

of it on the Mississippi side. We have the testimony brought out by Plaintiff in Error of how this Old River was washed out in 1857, and yet, in spite of this testimony, this Court is asked to indulge a presumption that its present depth is uniform from the date of the avulsion to the present time, and this by one whose line does not come within nearly a mile of any possible point of contact.

The Plaintiff in Error, notwithstanding the instructions, is shown by the record not to have any title that could draw in question the determination of the State boundary, as examination of the briefs filed in the Supreme Court of Mississippi will demonstrate. The appellee, Defendants in Error, were not content to have their rights adjudicated upon the theory which is attempted to be presented here as the sole controlling factor, but proceeded in that Court upon the theory, the instructions to the contrary notwithstanding, that the present Plaintiff in Error wholly failed to prove a title in itself, for the reasons hereinbefore set forth, and, therefore, no federal question could arise.

Counsel (Bf. 3) contends: "It thus appears that if the land in question is in Arkansas, it belongs to the Plaintiff in Error, as accretions to Sections Twenty-two (22) and Twenty-three (23)."

Therein lies a fundamental error; for, as was said by Isom White (Tr. 20), when Plaintiff in Error had invaded, confessedly, Mississippi territory, and demanded the delivery of the timber in controversy:

"Q. Well, what did they say, if you did not let them have it?

"A. Said if we did not let them have it, why, of course they were going to put us in jail."

Whereupon, Instruction No. 2 (Tr. 160) was given for Defendants in Error:

“The Court instructs the jury, that should they find from the evidence, that the plaintiffs cut the timber in controversy in good faith, by authority of King and Anderson.....who **bona fide** claimed the lands.....and the defendant, by force or intimidation, took the timber away from them, then the plaintiffs have made out a **prima facie** case, and it devolves upon the defendant to show by a preponderance of the evidence that it is the **owner of the land from which the timber was cut**, before defendant can recover in this cause”; (*Italics ours*).

Thereby is enunciated a **rule of evidence** under which in order to recover, title in defendant must have been proved. **Liberman v. Clark**, 114 Tenn., 126.

This burden of proof was not met; we may surmise that there was a reason therefor, and in this we would not err, because in the record, in No. 7, Original, **Arkansas v. Mississippi** (Tr. 368) in this Court it appears that one Thomas W. Stringer was the owner of the land described as:

“**All of that tract of land known as Horseshoe Island**, and more particularly described as follows: “All of Fractional Section two (2), except North half of Northwest quarter; all of fractional section three (3), all of fractional section ten (10), all of fractional section fourteen (14), all of fractional section fifteen (15), all of fractional section twenty-two (22), all of fractional section twenty-three (23); all in township four (4), South of range four (4) East, with accretions thereto, **containing eight hundred and eight and forty-two hundredths (808.42) acres.**” (*Italics ours*).

Turning to the governmental plat, the total acreage of Horseshoe Island in 1816 is given as: 1504.18, but as said Stringer did not own the North half of the North-

west quarter of fractional section two (2), (said subdivision containing, as per plat, 119.78 acres), we deduct one-half thereof or 59.89, leaving an actual area, as surveyed in 1816, of 1444.29 acres.

Now the recital of the petition to sell in Stringer's estate shows that "with accretions," said sections contained "808.42 acres." The difference between said 1444.29 acres and this 808.42 acres had disappeared.

Under the laws of Arkansas, there was an appraisal of this property, (Tr. 368), Original No. 7, by George Walker, S. I. Clarke and W. H. Stone, who appraised said land after "viewing it," as containing 808.42 acres, at \$1.50 per acre.

The laws of Arkansas, beginning in the Code of 1874, Sections 177, 178, 179 and 180, brought forward as Sections of S. & H. Code, 1894, as 192, 193, 194 and 195, provide: "It shall be the duty of the executor or administrator, if the lands and tenements ordered to be sold as aforesaid, do not sell for two thirds of the appraised value thereof, to reserve the same from sale."

It appears by the order of Court that this appraisal was made at \$1.50 an acre, on a basis of 808.42 acres, which would aggregate \$1212.63, and the bid of the said W. A. Rust for this land is shown as two thirds thereof, or \$808.42, which amount he paid on the basis of \$1.50 an acre.

Thus it is perceived why the Plaintiff in Error was willing to rest upon an agreement as to title that did not cover **accretions**. In the first place, "all of Horseshoe Island" was owned by Stringer, and its area was shown as 808.42 acres, **including accretions**, in 1894, when there was no controversy over it, and having obtained title to 808.42 acres, including accretions, under an appraisalment

at \$1.50 an acre, and having had the sale confirmed, it comes with an ill grace from Plaintiff in Error to claim that it obtained under this deed for 808.42 acres, something in excess of 4,000 acres, and which, at the paltry sum of \$1.50 an acre, would have been a fraud upon the estate to the extent of many thousands of dollars.

We, therefore, say that the proof on this proposition was not made by Plaintiff in Error, because it dare not go into the irregularities of that Administrator's sale, which was introduced as a part of the proceedings in Original No. 7, and which, on its own motion, is being heard with this case.

But it may be said that this Court cannot notice the recitals in Original No. 7. These two, however, are companion cases; and, if this did not suffice, this Court takes judicial knowledge of its own records (as per **Min. & Smelting Co. v. Billings**, 150 U. S. 31; **Bienville Water Supply Co. v. Mobile**, 186 U. S. 212; **Butler v. Eaton** 141 U. S. 240.) But even were this not so, it would furnish a satisfactory explanation of the absence of a Federal question from the record, viz., because it could not prove it had title to more than 808.42 acres.

Counsel say (Brief 19): "It may be that this cause could have been tried without reference to the ownership of the land on which the timber was cut. It is obvious, however, that Defendants in Error could not safely rely merely on the contention that the timber was taken from their possession by force and intimidation, because it appears that the timber was claimed by Plaintiff in Error, while it lay on the ground where it was cut; that the defendant in error gave it up at a meeting with Plaintiff in Error's agent in the State of Mississippi, and thereupon entered in the employment of Plaintiff in Error for the purpose of removing the cut timber, and that this replevin suit was instituted a

couple of weeks later, after some of the timber had been floated in a raft to the Mississippi shore."

In this statement there are many errors:

(a) The replevin suit was instituted on January 22nd, 1913, (Tr. 2), and, as said by Zanders Parker (Tr. 14):

"Q. Well, how long was it before you brought this suit?

"A. Just as soon as Mr. De Sha come with the high sheriff of Phillips County, and demanded us not to bother the timber any more he would put us in jail, we went straight away.

"Q. How long was that before you brought this suit, how long after this conversation before the suit was brought?

"A. Before it was put in?

"Q. Yes?

"A. Right away next day.

Mr. DeSha (Tr. 47) shows this conversation to have been January 21st; the writ of replevin shows it was issued January 22nd.

The course pursued by Defendants in Error was based upon **Railroad v. Leblanc**, 74 Miss., 649.

(b) At page 36 it is again reiterated that Plaintiff in Error did not take possession of the timber physically on the ground, but went to these negroes, in Mississippi, with a petty Arkansas official, and attempted to terrorize those who had, in good faith, paid \$3.50 a thousand for this timber, and in addition had worked on it for three weeks.

Take his own testimony:

"Q. What did they say, if anything, about releasing it or not releasing it?

"A. Why they said would release the timber.

“Q. What threat did you make against them, if any, if they didn’t release it?

“A. Well, the deputy sheriff told them that if they ever went across there or did not release this timber, they were going to take hold of them and take care of them.

“Q. That was over in Mississippi that this conversation occurred, was it?

“A. Yes, sir. That was in Mississippi.

“Q. He told them that they might be taken and arrested if they went over there on that land anymore?

“A. He did. Told them he would take them down in Helena. (Tr. 47).

“Q. What offer, or threat, of violence did you make towards these plaintiffs if they moved that timber.

“A. Well, that was all that was said, that if they ever crossed over or taken that timber, or molested that timber in any way, that they were going to be put in jail, taken care of.

“Q. And who said that? you or this deputy sheriff?

“A. The deputy sheriff.

“Q. What did you say yourself?

“A. I told them also that was my intention to do.” (Tr. 47).

Turning back to the negroes’ version of it, it will be seen that this Plaintiff in Error was represented by these white men who were guilty of acts of petty tyranny.

“Q. Well what did they say if you did not let them have it?

“A. Said if we did not let them have it, why, of course, they were going to put us in jail.

“Q. Did you turn it over to them willingly?

“A. No, sir, did not turn over to them willingly.

“A. What did you do immediately when they took charge of the timber?

“A. When they took charge of the timber, of course, he explained to me that this was the sheriff of Phillips County, Arkansas, by me being a negro man, I just give down, had to give down.” (Tr. 20.)

All the other witnesses testified the same way, and to say, in the face of this testimony, that Defendant in Error, gave up this timber willingly, as Plaintiff in Error's witnesses do, is simply preposterous. It demonstrates that Plaintiff in Error was not willing to pursue the plain course pointed out by law, but was actuated by a desire to apply the rule of force.

On this conflict of evidence the jury found a verdict, and the Supreme Court affirmed the judgment.

(c) The instruction for the Defendants in Error was that Plaintiff in Error, by reason of the force and intimidation used, had to prove the legal title of the land to be in itself, in order to justify its wrongful act.

It is true that, in addition to this, there was evidence tending to show that this Pecan Lake was washed out in 1857, and furthermore, that there was adverse possession; and, furthermore, that the Defendants in Error were the owners; but, principally, the proposition turned upon the wrongful act of the Plaintiff in Error, in seizing, by intimidation, a possession whereto it had no right, and the burden thus cast, has not been met.

It furthermore appears that the land in question is a portion of lot One (1), as actually surveyed in 1835, and that the Mississippi River has now left that which was surveyed above ground, and thereby, under the doctrine of reliction, Defendants in Error were entitled thereto **Hughes v. Birney**, 32 So., 30; **Maw v. Brenau**, 156, N. W.,

792; **Marks v. Sambrano**, 170 S. W., 546; **Widdiecombe v. Rosemiller**, 118 Fed., 96; **Murphy v. Norton**, 61 How. Prac., 197; **Same case**: 100 N. Y. 424.

In re City of Buffalo, 99 N. E., 853, cited, does not conflict with this doctrine—this case being approved in **Arkansas v. Tennessee**, 246 U. S., 174.

In the Buffalo case, the lands that were submerged were hopelessly gone; and in the instant case, they have reappeared under natural causes and are located by actual survey. This being true, **St. Louis v. Roots**, 138 U. S., 247, applies:

“It is well settled that the owner in fee of the bed of a river, or other submerged land, is the owner of any bar, island, or dry land which subsequently may be formed thereon.” Approving **Mulry v. Norton**, 100 N. Y. 748.

There are other claims more at length set forth in the original brief and to which reference is made.

The principal contention of counsel, that the line between Mississippi and Arkansas is equidistant from the visible banks is **not founded upon the instructions** in this cause. They expressly fixed the boundary line as the **middle of the main channel**, without defining it; and do contend, under the rulings of this Court, that, where the middle of the main channel cannot be located by proof, then that this Court will assume it to be equidistant between the fixed banks in a normal stage of water, even if it were a federal question.

Our position is directly supported by **Iowa v. Illinois**, 147 U. S., 8, where Mr. Creasy is quoted, with approval, thus: “It has been stated that, where a navigable river separates neighboring states, the thalweg, or middle of a navigable channel, forms the line of separation. Formerly, a line drawn along the middle of the

water, the **medium filum aquae** was regarded as the boundary line; and still will be regarded **prima facie** as boundary line, except as to those parts of the River, as to which can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the **medium filum**. When this is the case, the middle of the channel of traffic is now construed to be the line of demarkation."

State v. Kean, 84 Missouri Appeals, 130.

Counsel is in error as to the **sole contention** being the boundary between Arkansas and Mississippi. Counsel for Defendant in Error have admitted that the decisions of this Court were conclusive upon all Federal questions and the instructions of the circuit court, both for defendant and for plaintiff are conformable to the decisions here, saving and excepting that those granted the Plaintiff in Error were more liberal than it was entitled to, as shown **supra**.

There was not any trial of the issue of the boundary line between the two states in the supreme court of Mississippi; that which was insisted upon there, as conclusive, among others was, (a) that Plaintiff in Error did not own below the high water mark; (b) that the State of Arkansas reserved the channel of all streams for public purposes; (c) that the burden of proof imposed by the wrongful taking was not met.

The instructions, quoted by the Plaintiff in Error: (Bf. 23) "That the boundary line between the States was the 'thread of the stream or channel of the Mississippi River at the time of the cut off in 1848', or 'a channel of the Mississippi River where the cut off in 1848 occurred,' is not correctly quoted, (Tr. 160,); and the definition given by the Court by its instructions of such channel was not, as counsel contends, 'a line equally distant from both banks;' but, the Court expressly told the jury that, (Tr. 161):

“The Court instructs the jury for the defendant, that if they believe from the evidence that the body of water shown on the maps introduced in evidence in this case was the last channel of the river as it dried up then the jury should find for the defendant.” This same principle is enunciated throughout the instructions of the Court.

This contention in the circuit court would have been perfectly proper, however, under the facts in this case. Plaintiff in Error did not introduce a single witness who could swear and did swear, as a fact, that, at the date of the avulsion, the middle of the main channel of commerce was coincident with the thread of Old River. Until that was done, the presumption of the channel being equidistant from the banks controlled. Authorities *supra*.

A sufficient reason for refusing the instruction quoted in part, by counsel, was that it was violative of Section 793, Code of 1906, under which the Judge, in any cause, is prohibited from summing up, or commenting on the testimony, or charging the jury as to the weight of the evidence; and singling out parts of the testimony is condemned under the State practice under this statute.

French v. Sale, 63 Miss., 386;

And, in Mississippi, under this statute, the court cannot originate instructions, and can only give those that are asked, and, if Plaintiff in Error desired fuller instructions, his recourse was to have asked them.

It is furthermore contended that the instructions for Plaintiff in Error awarded it this land, if it was in the State of Arkansas, and that, therefore, this was conclusive; but, under the Mississippi practice, the supreme court is required to render a judgment in accordance with the very right of the cause, and, in the instant case, the instructions which were given upon this aspect, for Plain-

tiff in Error, were broader than Plaintiff in Error was entitled to, and more than it had the right to ask, as hereinbefore shown; and the point that these instructions were designed to produce was pressed home in the Mississippi Supreme Court, with the effect that this case was affirmed without any opinion, which would not have been the case had it decided any fundamental proposition, or any important principle of law. Section 4918, Code 1906; **Y. & M. V. R. R. Co. v. James**, 108 Miss. 852, *supra*.

Counsel well says, that in the petition for a reargument it is said:

“There are now pending between this appellant and various other persons, in addition to this cause, two other suits involving timber cut from land situated in what was Horseshoe Bend. whether the decision of the court in this case is decisive, or affects either of these cases depends upon what this Court decides in this case. To fail to state to appellant the reason why it has been turned away. it seems, inconsistent with the principle that public policy demands an end of litigation.” (Tr. 172.)

It thus appears, that counsel in this suggestion of error did not conceive that there had necessarily been any such decision made as its counsel, who now represent Plaintiff in Error in this court, contends.

If any such “important principle” as that boundary of sovereign States had been decided, and the attention of the court was sharply called to it as involving a Federal question, and with a view to admit of error to the court, (Tr. 171), the Supreme Court of Mississippi would have granted the request for an opinion in writing conformably to Section 4918, Code 1906.

This shows that the Supreme Court of Mississippi did not pass upon a Federal question in affirming this

judgment; and, also, for the reasons, hereinbefore set forth.

Counsel claim that no other question than that of boundary was involved, but, therein, as hereinbefore shown, Counsel is in error, and any instruction of the Court which gave this land to the Plaintiff in Error, simply by reason of its being in Arkansas, was and is, erroneous, for the reasons hereinbefore set forth.

The instructions of the circuit court are in harmony with the decisions of this court; and they are more favorable to Plaintiff in Error than it was entitled to have.

At Bf. p. 23, Counsel claims that Defendants in Error conceded in their supplemental brief that the instructions are not in accordance with the decisions of this court, and this is not true; but this meant that said instructions are more favorable to Plaintiff in Error than this Court has ever authorized; and being more favorable to Plaintiff in Error, the Plaintiff in Error cannot complain.

The Supreme Court of Mississippi did not err in refusing to reverse the judgment on the ground that a verdict should have been directed for Plaintiff in Error. This is manifestly true, because among other things,

(a) What are boundaries is a matter of law for the court; where they are is a matter of fact for the jury. **Barclay v. Howell's Lessee**, 6 Pet. 498; 9 C. J. 289.

(b) Plaintiff in Error did not have title below the high water mark in Arkansas.

(c) There was a conflict in the evidence as to the taking by force and intimidation.

(d) Plaintiff in Error did not prove itself to be the

owner of the land; on the contrary the evidence shows that it was not such owner; that it did not even pay taxes on the land; and, as now appears in the companion case, that it did not buy it at all.

(e) It is not entitled to accretions after an avulsion.

(f) There was testimony as to the formation of old River which had to be submitted to the jury.

(g) As between Plaintiff in Error and Defendants in Error, there is not now and never has been, a controversy as to the boundary line, because their rights have never been brought in conflict at any point—being always separated under the uniform decisions of Arkansas by at least one half of the Mississippi River.

THIS CAUSE IS REVIEWABLE BY CERTIORARI ONLY, IF REVIEWABLE AT ALL, BECAUSE THERE WAS NOT DRAWN IN QUESTION THE VALIDITY OF ANY STATUTE, TREATY OR AUTHORITY EXERCISED UNDER THE UNITED STATES.

Opposing counsel contend that this cause, assuming the Federal questions had been passed upon, could be reviewed under a writ of error, and that the exclusive method was not a writ of certiorari.

The Plaintiff in Error, since filing its brief, has made a motion in this court for a certiorari, and this, in effect, is a confession that a writ of error cannot be maintained. Primarily, opposite counsel cannot point out in the instructions any conflict detrimental to Plaintiff in Error between the rule announced in them and the decision of this Court in *Arkansas v. Tennessee, supra*, and *Cissna v. Tennessee, supra*. The instructions, as such, do not call in question the validity of any authority exercised under the United States, or the validity of any treaty or statute. The most that can be said, admitting the exist-

ence for the sake of the argument of the Federal questions, that there was a question of fact submitted to the jury, under concededly valid treaties. The distinction is between an attack upon the validity of the treaty, and, at most, a question of fact with reference to its construction.

As hereinbefore pointed out, certain instructions were granted Plaintiff in Error to which under the rulings of this court, it was not entitled, and there is no controversy in this record as to the validity of the treaties, of any authority exercised under the United States.

The most that can be said is that there was a construction of said treaties as to said territory involved, and, in cases of this character, jurisdiction must be obtained by *certorari*. **Erie Railroad Co. v. Hamilton**, No. 112, decided January 7th, 1919, holds:

“Since, as we have seen, the Plaintiff in Error has not assailed the validity of the Russian treaty, but, on the contrary, has claimed under an asserted construction of it, which was denied, it is clear that the case cannot come into this court by writ of error, under the statute quoted. At most the Railroad Company asserted a right under the treaty which was denied to it by the state courts, and this, under the plain reading of the statute, could give it a right to review here only by writ of *certorari*.

“The distinction between the assailing the validity of a treaty or of a statute, and relying upon a special construction of either is patent and has been the subject of such full discussion by this court that it should not now be considered doubtful or obscure. **Baltimore & P. R. Co. v. Hopkins**, 130 U. S. 210, 32 L. Ed. 908, 9 Sup. Ct. Rep. 503; **District of Columbia v. Gannon**, 130 U. S. 227, 32 L. Ed 922, 9 Sup. Ct. Rep. 508; **Louisville & N. R. Co.**

v. **Louisville**, 166 U. S. 709, 715, 41 L. Ed. 1173, 1175, 17 Sup. Ct. Rep. 725; **United States v. Lynch**, 137 U. S. 280, 285, 34 L. Ed. 700, 702, 11 Sup. Ct. Rep. 114; **South Carolina v. Seymour**, 153 U. S. 353, 358, 38 L. Ed. 742, 744, 14 Sup. Ct. Rep. 871; **United States ex rel Taylor v. Taft**, 203 U. S. 461, 464, 51 L. Ed. 269, 274, 27 Sup. Ct. Rep. 148; **Stadelman v. Miner**, 246 U. S. 544, 62 L. Ed. 875, 38 Sup. Ct. Rep. 359."

See also **Kennard v. Nebraska**, 186 U. S. 304; **Central Vermont R. Co. v. White** 238, U. S. 507; **Development Co. v. Philippines**, 247 U. S., 389; **Ramos v. Tobacos**, 241 U. S. 461; **Gsell v. Collector**, 239 U. S., 93; **Rama v. Rama**, 241 U. S., 160.

The distinction made is conclusive of the proposition involved. The validity of the treaty or of the authority must be denied. This was not done. It was conceded and is conceded throughout, as will appear from the entire proceedings in this cause.

But as shown, these treaties were wholly without effect in this case. Nothing more was decided than an interpretation of the several constitutions.

This contention was not submitted to the State Supreme Court, and it is urged here for the first time—in the State court the validity of the treaties was conceded, and is conceded here.

Ireland v. Woods, 246 U. S., 328 says:

"Coming then to consider what was involved in the decision of the courts below, it is manifest that the validity of no national enactment or authority was drawn in question, nor, in the meaning of the section, the validity of a statute or authority of the State.

“There is no doubt of the right of the Governor of New Jersey to have demanded of the Governor of the State of New York, the extradition of Ireland, or of the Governor of the latter State to have complied. Indeed, it was the duty of both *so* to act, if the case justified it, and whether there was such justification was the only inquiry and decision of the court below,” and then declares that which is conclusive here: “**A dispute of the facts upon which the authority was exercised is not a dispute of its validity.**” (*Italics ours.*)

The distinction between the construction of an act—and in this case a construction more favorable than that vouchsafed by this court was given—and the denial of the validity thereof is a criterion whereby it is to be determined whether certiorari or writ of error is to be pursued. **Coon v. Kennedy** No. 398 Oct. Term, 1918, decided January 13, 1919.

As was said in **Baltimore &c R. R. v. Hopkins**, 130 U. S., 226; “The validity of the statutes and the validity of authority exercised under them, are, in substance, one and the same thing; and the validity of a statute, as these words are used in the Acts of Congress, refers to the power of Congress to pass the particular statute at all, and not to the mere judicial construction as contradistinguished from a denial of legislative power.”

So, here, there was never a denial of the power; or of the validity of any of the treaties, or of the authority of the United States, but it is now and has been conceded throughout this litigation, that, they are binding upon all parties in accordance with the decisions of this Court.

See, also, **Sund v. United States**, 118 U. S. 363; **District of Columbia v. Gannon**, 130 U. S. 227; **Railroad Co. v. Louisville**, 166 U. S., 1175; **United States ex rel. v. Seymour**, 153 U. S. 353; **United States v. Taft**, 203 U. S. 461.

But it is said that this writ of error was granted by a Justice of this court, and therefore, that it is effectual, whereas, had it been granted by the Chief Justice of the Court **a quo**, it would have been ineffectual. We fail to perceive any distinction made between one writ and the other.

In the case of a certiorari, the matter would have had to be judicially considered, and Defendants in Error would have had an opportunity to be heard. The enforcement of this distinction in the many cases recently dismissed by this court should answer this contention.

Ireland v. Woods, 246 U. S., 328, points out the distinction thus:

“The difference between the remedies is that one (writ of error) is allowed as of right, where, upon examination, it appears that the case is of the class designated in the statute, and that the Federal question presented is real and substantial, and an open one in this Court, while the other (certiorari) is granted or refused in the exercise of the court's discretion.”

It cannot be contended that the granting of a writ of error is tantamount to a judicial determination by this court of a right to a review by certiorari.

This point was passed upon in **Cisna v. Tennessee**, 246 U. S., 293, where the Court declared:

“This objection was overruled. A final judgment or decree went against him for upwards of \$110,000, and the case was brought here by writ of error under Section 237, Judicial Code, before the amendment of September 6, 1916.”

There was no necessity of so declaring, except to ex-

clude the conclusion that, after date, a writ of error was not the proper means of transferring the cause.

Section 1005, R. S. does not apply. The writ of error must be dismissed.. **Mason v. United States** 136 U. S., 581; **Estes v. Trabue** 128 U. S. 230; **Hardee v. Wilson**, 146 U. S. 181.

II. (B)

Surety Companies were necessary parties.

In **Tardy v. Rosenstock**, 80 So., 1, (Miss.) the Court said:

“No summons has been issued herein for Farries. Consequently, appellant is not entitled, under the statute, to proceed with the appeal; but we do not think the judgment of the court below should be affirmed for that reason. The proper procedure, when the statute referred to has not been observed, is either to dismiss the appeal or require the statute to be complied with before the cause is taken up for consideration by the court.”

And the Mississippi Supreme Court could have dismissed this appeal for that reason.

This decision was made upon December 2nd, 1918, and it construes the statute upon which Plaintiff in Error relied, and shows conclusively that the rule in Mississippi is the same as in this Court. If Plaintiff in Error desires to have this judgment of the circuit court reversed as to the United States Fidelity & Guaranty Company, it was essential that said Company be brought before said Supreme Court.

The contention that the Surety Company on the appeal bond to the State Supreme Court is not the same person as was surety thereon is preposterous. There is a judgment in the Supreme Court of Mississippi which is

sought to be reviewed here against the party named, and such party to said judgment in the state is expressly described as "Surety in the supersedeas bond," (Tr. 171) and if Plaintiff in Error desires to reverse that judgment in this court, every person who was a party to that judgment must be brought before this Court.

Error cannot be presumed when the bond is shown and a judgment is recited to have been rendered on it by the Court in which it was filed.

III.

THE BOUNDARY BETWEEN ARKANSAS AND MISSISSIPPI WAS NOT DETERMINED BY THE STATE SUPREME COURT; BUT IF SO, SUCH DETERMINATION WAS STRICTLY IN ACCORDANCE WITH THE LAW.

As we have endeavored to show *supra*, there was and never could be a controversy between Plaintiff in Error and the Defendants in Error which involved directly or indirectly the boundary line between Mississippi and Arkansas. It is true that in the submission of this cause to the jury there were certain instructions given which seemed to involve the boundary; but when the cause reached the State Supreme Court, the appellee, Defendants in Error, were not content to let the matter be presented to that Court in the light wherein it was tried below, but challenged, at the very outset, the title of the Plaintiff in Error, and had its challenge sustained; not on any ground that there was a question as to the validity of the treaties or authorities, but solely because there never was and never will be a common boundary line between the Plaintiff in Error and the Defendants in Error. This is covered fully under Point I above and will not be reiterated. Any question on that score, as we said in the State Supreme Court, will be between the State of Arkansas and the defendants in Error.

IV.

THE SUPREME COURT OF MISSISSIPPI DID NOT ERR IN SETTING ASIDE A CONTINUANCE GRANTED WITHOUT CONFORMITY TO ITS RULES; IN THIS, THAT THERE WAS NO NOTICE SERVED.

Rule 16 of the Supreme Court, provides:

“Every Saturday shall be motion day; if counsel be not present and have no briefs filed when their motions are regularly called, such motions shall be dismissed. No motion will be considered until the opposite party shall have at least three full days notice, by mailing, or delivery to such party of the same.”

The principal reason for setting aside the continuance was that no notice of it had been served as required by the rule, and when this appeared, the cause was set upon the docket for hearing in its regular order. The action of the Court with reference to granting a continuance never presents a Federal question when presented to an appellate court, whose sole function is to decide whether or not a judgement rendered by the Circuit Court of Coahoma County was correct. **Boone v. McJunkin** 63 Miss., 561; **Burt v. Caulk**, October term, 1918, without opinion. The Supreme Court considered the case in due order upon its merits, and that this would have conformed to all decisions of this Court upon Federal questions is not controverted by the counsel who appeared there for Plaintiff in Error. That which was decided by the Court, not its determination to hear the case, must present the Federal question. **Franklin v. South Carolina**, 218 U. S. 168; **Davis v. Texas**, 139 U. S. 651.

Furthermore, this was in no sense a final judgment, it was merely preliminary to the determination of the case upon its merits and when it was set aside, the Plaintiff in

Error, without any protest, proceeded to the hearing upon the merits. Unless the judgment had been final, there could have been no jurisdiction to review it. Judicial Code, 237. **Missouri v. Olathe**, 222 U. S. 185. This mere order to restore the cause to the docket for hearing did not make any final judgment which would be subject to review; it merely placed the cause upon the calendar for hearing. As was said in the Olathe case—"As it does not appear from the record that the judgment sought to be reviewed was one which finally determined the cause this court is without jurisdiction."

Wherefore we respectfully submit that this writ of error must be dismissed; but that, if jurisdiction is taken, then that there must be an affirmance of the judgment.

Respectfully,

GERALD FITZGERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER WYNN GREEN,
Attorneys for Defendants in Error.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

RUST LAND AND LUMBER COMPANY
Plaintiff in Error

v. No.

ED JACKSON ET AL,
Defendants in Error.

**SUPPLEMENTAL BRIEF UPON MOTION TO
DISMISS OR AFFIRM, AND BRIEF FOR DEFEN-
DANTS IN ERROR.**

STATEMENT.

The motion to dismiss or affirm was continued to the merits and is renewed.

The issues made are apparent in the briefs submitted to the state court appended, as appendix I, duly certified. The points made for defendants in error, appellee below, are respectfully relied upon and are not inserted again, to save prolixity, quotations alone being omitted.

The question was as to the ownership of timber cut by defendants in error at the places shown upon the plat. Lots 1 to 9, inclusive, Section 11, Township 28, Range 5, W., Coahoma County, belonging to the vendors of defendants in error, Sections 22 and 23, in T. 4, R. 4, E, Phillips

County, Ark. (R. 7) to plaintiff in error; containing 56.53 acres and 12.33 acres, respectively (R. Plat annexed.) If the lands from which this timber was cut were platted, as a part of the State of Arkansas and not as a part of the State of Mississippi, it would be located in approximately the North West quarter, Section 28, and South West Quarter, Section 21, T. 4, R. 4 E., considerably over a mile from the nearest point admitted by the record to belong to the plaintiff in error (R. Plat). The admission of this title does not cover **accretions**, but merely the sections. (R. 7).

We differ with counsel fundamentally in his statement of the controversy.

The circuit court shifted the burden of proof from the defendant in error to the plaintiff in error, because of its thoroughly reprehensible acts, wherein, after discovering that these ignorant negroes paid for the timber in question, plaintiff in error brought into Mississippi, an officer of Arkansas, and by force took from them, that upon which they had labored for weeks, and for which they had paid full value.

The land wherefrom the timber was cut is situated partly in what was surveyed as a part of lot 1, Section 11, T. 28, R. 5 W., in the survey in Mississippi, in 1833, by the Government, and partly what was then surveyed as a part of the bottom of the Mississippi River, but which constituted under the Mississippi decision a portion of the riparian owners' rights. In 1817, when Arkansas was surveyed, there was shown to be in the river, off of Sections 22 and 23, a large island; the history whereof does not anywhere appear herein, that is to say, whether or not the thread of the stream did run or not run between the Arkansas side and this island between 1763 and 1817; very certainly, the steamboats pursuing the channel of navigation never went between the Mississippi shore and this island, because so to do, would have entailed a detour of a goodly number of miles.

The avulsion occurred in 1848, and thereafter, just as in the Centennial cut off cases, the whole channel proceeded thereon to dry up, and who owns a portion of this timber thereon is the question.

The writ of replevin issued January 22nd, 1913, (Tr. 2), the timber was taken by plaintiff in error, January 21st. The writ was not executed until February 8th, February 10th a forthcoming bond was given by the plaintiff in error with the United States Fidelity & Guaranty Company, as surety, (R. 13), under which possession of the logs was taken by plaintiff in error, who has since converted them by sale. (R. 53.)

The declaration is in the statutory form (R. 4), and the plea is that of the general issue.

In order to save time, an agreement as to title was made, under which it was stipulated that defendants in error owned lots 1 to 9 inclusive, section 11, T. 28, R. 5, while plaintiff in error was admitted to own Sections 22 and 23, T. 4, R. 4 E. in Phillips County.

Zanders Parker, defendant in error, stated that the logs were cut between the Levee (Note the mis-spelling through the record of "levee" as "levy"), and Dustin Pond, under a written contract executed by Anderson, Jackson and Williams who owned the land.

"Q. Now on this land, how long have you been knowing this land on which you cut this timber?

"A. Seventeen years.

"Q. Who has been in actual occupation of that land during all of the time claiming it as theirs?

"A. Same parties claiming it now.

* * * * *

"Q. What, if any, dispute, about it did you ever hear?

"A. No, sir, none at all." (R. 8.)

Defendants in error were engaged in cutting timber nearly three weeks, and at the time of the coming of the sheriff, were on the Mississippi side of the Levee.

“Q. Tell what he told you then?

“A. He came and brought warrants from Phillips County, Arkansas, and when he came, he told us that if we would give the timber up, or else come on with them; of course when he came and brought the high sheriff, rather than go with them, they taken it away from us. (T. 9.)

* * * * *

“Q. In what way did they take it from you, by force or not?

“A. By force, we wasn't willing to give it up; come there with the high sheriff from Phillips County; we were satisfied we were right, but when the high sheriff come, couldn't help it, said it would be compelled to give it up when the high sheriff come, he come and took it away from us.” (R. 9.)

Isom White stated that the timber cut was pointed out to them by its owners. (R. 17.)

“Q. What, if any, acts of possession, Isom, did Charley McGhee, King and Anderson, and Ellen Jackson and Joe Williams, the owners in Section 11, with whom you had a contract to cut this timber, exercise over this land where you cut this timber?

“A. They had claimed it for twelve years to my knowledge.

“Q. What had they done there, if anything?

“A. Yes, sir, got them some fire wood off of there.”
* * * And had sold some of the timber to a man named Hull. (R. 18.)

This timber cost defendants in error \$3.50 per thousand feet outside of their labor. (R. 19.)

One defendant in error, detailed the conversation thus:

“Q. Did you turn it over to them willingly?

“A. No, sir, I didn’t turn it over to them willingly; * * by me being a negro man, I just give down, had to give down * * I pleaded to Lawyer Fitzgerald for relief.” (R. 20.)

The owners have been living right across the lake from this land for 22 years to my knowledge. (R. 21.)

Charley McGhee, one of the owners, testified that all of the land on the Mississippi side of the levee was in cultivation, and that he and “Sister” Jackson told the defendants in error where to cut, and that he had his lines run out over there by a surveyor about twelve years ago. (R. 25.) He claimed ownership by reason of “cutting it and using it from over there.” He sold some of this timber to Mr. Leavenworth, seven or eight years ago, possibly longer. He sold some to Mr. Hull ten or twelve years ago. (R. 26.)

Mr. Hull once surveyed it for him and showed him where his lines were and ran his line over near the bank of Dustin Pond. (R. 27.)

The remarkable development is this, on cross-examination:

“Q. You are not old enough to have been living there when the cut off was made in the river in ’48, are you?

“A. No, sir, I wasn’t here in ’48, I was here in 1857 when the water come in July. (R. 28.)

“Q. You don’t know how that land formed over there north of that lake do you?

“A. I know a portion of it when the cut off was made, where that cut off was made in 1857, you could

go across there, there was a little lake across there, just kind of a wash, and the water come in '57, and washed, cleaned out a lake there.

“Q. This lake was there at that time?

“A. It was a little small stream, a little small, a little kind of a flat there.

“Q. But the main body of water was there, wasn't it?

“A. After the high water come in?

“Q. Real swift current was there, wasn't it?

“A. No, sir. (R. 29.)

Substantiating this is the evidence of old Harry Malone. (R. 155.)

Plaintiff in error wholly failed to prove the location of (a) the **high water mark on the Arkansas side at the time of the avulsion**, (b) the **location of the thread of the stream or navigable channel**, as existing at the date, and went to trial upon the facts, **claiming ownership under an admission of title to Sections 22 and 23, of Township 4, Range 4.**

Divers instructions were had (R. 160-161), a verdict was rendered in favor of defendants in error and judgment had thereon. (R. 164.)

Rust Land and Lumber Company, made a motion for a new trial (R. 164), wherein the surety on the replevin bond did not join, which motion (R. 165) was promptly overruled, and, a bond was given by the Rust Land & Lumber Company, as principal, with the United Casualty and Surety Company, as surety, which operated, on appeal, to the State Supreme Court.

The errors assigned are shown (R. 167-8). Counsel for plaintiff in error made a motion to continue the cause on March 4th, 1916, (R. 178) which motion was sustained

by reason of there not being any contest made as no notice was received; immediately upon getting notice, a motion was made (R. 179) to set aside the continuance, which was granted. The case then came on for regular hearing and was affirmed December 23, 1916 (R. 171), whereupon, there was a motion for a re-hearing (R. 181), which was denied January 8th, 1917 (R. 179), and, thereupon, a writ of error was sued out to this court by the Rust Land & Lumber Company alone; the judgment in the supreme court being against the Rust Land & Lumber Company and the United Casualty & Surety Co. (R. 171.)

SUPPLEMENTAL BRIEF ON MOTION TO DISMISS OR AFFIRM.

I.

A writ of error not appropriate means for transferring jurisdiction.

Conceding a federal question, nevertheless a writ of error cannot be used to reverse the final judgment rendered December 23, 1916, by the Supreme Court of Mississippi; under the amendment of Section 237 Judicial Code, certiorari became the appropriate remedy.

In Philadelphia & Reading Coal & Iron Company v. Gilbert, 245 U. S. 162, the Court said:

“Under Section 237 of the Judicial Code, as amended September 6, 1916, (chap. 448, 39 Stat. at L. 726 (Comp. Stat. 1916, Section 1914), a final judgment or decree of a state court of last resort in a suit ‘where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of

the United States, and the decision is in favor of their validity,' may be reviewed in this court upon writ of error; but, if the suit be one 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority,' the judgment or decree can be reviewed in this court only upon a writ of certiorari. The difference between the two modes of securing a review, as contemplated by the statute, lies in the fact that a writ of error is granted as of right, while a writ of certiorari is granted or refused, in the exercise of a sound discretion."

Again, in **Ireland v. Woods**, 246 U. S.—this Court said:

"A motion to dismiss is made, the grounds of it being: (1) The judgment of the court of appeals is reviewable, if at all, only by certiorari. (2) It is not reviewable at all because, under the limitation of the jurisdiction of the court of appeals, it had no power to review or decide the question whether there was any evidence to show that Ireland was a fugitive from justice, and that the court of appeals must be assumed not to have

passed upon or to have decided the question whether Ireland was a fugitive from justice. Whether the assumption is justified or not we do not consider, on account of the view we entertain of the first ground of the motion, to which we immediately pass. To sustain it counsel adduces Section 237 of the Judicial Code (36 Stat. at L. 1156, Chap. 231) as amended September 6, 1916, (Chap. 448, 39 Stat. at L., 726, Comp. Stat. 1916, Section 1214). It provides in what cases and how there can be a review of a judgment or decree of a state court by this court. It reads as follows: 'A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.'

"When, however, the conditions are reverse, that is, when state court judgments affirm the national powers against a contention of their invalidity, or sustain the validity of the state authority against an attack based on Federal grounds, there can be review only by certiorari. And the same manner of review is prescribed where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is either in favor of or against the claim set up.

"The difference between the remedies is that one (writ of error) is allowed as of right where, upon examination, it appears that the case is of the class designated in the statute, and that the Federal question presented is real and substantial

and an open one in this court, while the other (certiorari) is granted or refused in the exercise of the court's discretion.

"Coming, then, to consider what was involved in the decision of the courts below, it is manifest that the validity of no national enactment or authority was drawn in question, nor, in the meaning of the section, the validity of a statute or authority of the state. There is no doubt of the right of the governor of New Jersey to have demanded of the governor of New York the extradition of Ireland, nor of the governor of the latter state to have complied. Indeed, it was the duty of both so to act if the case justified it, and whether there was such justification was the only inquiry and decision of the courts below.

"We said in *United States ex rel. Champion Lumber Co. v. Fisher*, 227 U. S. 445, 57 L. Ed. 591, 594, 33 Sup. Ct. Rep. 329, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its validity. See also *United States ex rel. Foreman v. Meyer*, 227 U. S. 452, 57 L. ed. 594, 33 Sup. Ct. Rep. 331. If there be no dispute about the facts, *Hyatt v. People*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311, might apply. And necessarily the same principle and comment are applicable when there is drawn in question the validity of a statute of or authority exercised under a state."

Again, in *Stadleman v. Miner*, 246, U. S. ———, there was reinstated a cause wherein there had been an inadvertent omission to notice the opinion by the State Supreme Court of a Federal question, and yet in the same

case, 246 U. S., upon April 15th, 1918, this Court said:

“At the first argument of the case in the supreme court of Oregon, plaintiffs contended that to sustain the validity of the sale under the order of the county court would deprive them of their right to due process of law guaranteed by the 14th Amendment (see memorandum opinion of this court, 246 U. S. ———, ante, 395, 38 Sup. Ct. Rep. ———, March 18, 1918). Upon this contention the case was brought here under Section 237 of the Judicial Code, (36 Stat. at L. 1156, Comp. Stat. 1916, Section 1214. But under that section as amended by Act of Sept. 6, 1916, chap. 448, 39 Stat. at L. 726, Comp. Stat. 1916, Section 1207, a final decree of a state court of last resort can be reviewed here on writ of error only in a suit ‘where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.’ The judgment here involved was entered after the Act of September, 1916, took effect. There was not drawn in question the validity of any treaty or statute. And challenging the power of the court to proceed to a decision did not draw in question the validity of any authority exercised under the state. *Philadelphia & R. Coal & I. Co. v. Gilbert*, 245 U. S., 162 ante, 68, 38 Sup. Ct. Rep. 58; *Ireland v. Woods*, 246 U. S. ———, ante, 392, 38 Sup. Ct. Rep. 319, March 18, 1918. The writ of error is therefore dismissed.”

Still later in *No. Pac. R. R. Co. v. Solum*,———U. S.

———U. S. Adv. Op. (June 10, 1918), this Court said:

“The judgments entered were upon demurrers to the answers. That in number 205 was entered May 28, 1916; that in number 206 on May 23, 1916; that in number 526 on May 2, 1917. 133 Minn. 93, 157 N. W. 996; 133 Minn. 461, 157 N. W. 996; 136 Minn. 468, 162 N. W. 1087. In each case it is assigned as error that the state court held that the cause of action therein is not affected by the Federal statute regulating interstate commerce; and also that the state court assumed jurisdiction in advance of a determination by the Interstate Commerce Commission as to whether the practice of the Northern Pacific Railway, in sending via its interstate route all shipments of the character involved in these cases, was reasonable. In the third case the additional error is assigned that the court held that the intrastate rate should be applied, although the Interstate Commerce Commission had found that the practice of routing outbound shipments from Duluth via the interstate route was proper and reasonable. The objection that the court lacked jurisdiction to entertain the proceeding was not made in the answers in the trial court; but it was insisted upon before the supreme court of Minnesota; was considered and overruled by that court (133 Minn., 93, 97); and is available here. In numbers 205 and 206 judgment was entered before the Act of September 6, 1916. A Federal question is involved; and the cases are properly here under Section 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1916, Section 1214). In number 526 the judgment was entered after the Act of September 6, 1916, chap. 448, 39 Stat. at L. 726, Comp. Stat. 1916, Section 1207 took effect. In that case there was not drawn in question the validity of a statute or treaty nor the validity of any authority exercised under the

state. *Philadelphia & R. Coal & I. Co. v. Gilbert*, 245 U. S., 162, ante, 68, 38 Sup. Ct. Rep. 58; *Ireland v. Woods*, 246 U. S. —, ante, 392, 38 Sup. Ct. Rep. 319; *Stadelman v. Miner*, 246 U. S. —, ante, 430, Sup. Ct. Rep. 359. The writ of error in number 526 must therefore be dismissed, although the defendant in error has not objected to the jurisdiction of this court."

In the instant case there is not drawn in question the validity of a treaty or a statute of the United States, or of any authority exercised under the United States; nor is there any question made of the validity of any statute or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and it is only in these two classes of cases that a writ of error may be had as of right and then only when the first is denied and the second is granted.

Note that the validity must be "drawn in question," not merely the construction, and that the validity of no treaty or statute or authority is drawn in question is demonstrable by the statement of the case.

U. S. ex rel. v. Fisher, 227 U. S. 445. See, also **Muse v. Arlington Hotel Co.**, 168 U. S., 430; **Pettit v. Walsh**, 184 U. S., 205.

By no stretch of the imagination in the instant case could it be said that this case came within Section 237 of the Judicial Code as amended so as to grant a writ of error.

To exclude a conclusion that such a course might occur, this Court in **Cissna v. Tennessee**, 246 U. S., 289, made express reference to the fact that the writ of error was granted "before the amendment of September 6, 1916."

Plaintiff in error claims "a title, right, privilege, and

(or) immunity" under the Constitution and treaties of the United States, and when he does, certiorari is expressly made the sole means under which the decision may be reviewed. Even when the question is not raised the court *sua sponte* takes notice of it and dismisses the writ of error.

II.

Plaintiff in Error failed to show the existence of a federal question adversely determined.

The decision of the Supreme Court of Mississippi did not deny the Federal right of the plaintiff in error, by overruling its motion that this cause be continued to await the determination of the suit between the State of Mississippi and the State of Arkansas, then properly in this Court, to settle the boundary line between the two states at the point involved in this cause, primarily, or in any other manner.

We refer to the original brief upon this motion as conclusive—Plaintiff in error fails to show any right below **high water mark** in Arkansas, and the title between that water mark and the thread of the stream being in the State, the determination of original number six in this Court, is immaterial. Plaintiff in error in the circuit court of Coahoma county, claimed title, not under its judicial knowledge as to the location of the line in question, but under certain evidence, introduced in that court, by the plaintiff in error, which evidence did not include any reference to any of the treaties which were construed by this court in *Arkansas v. Tennessee*, *supra*.

There plaintiff in error made its right of recovery dependent upon the principles of law stated by it in its instructions. By the first instruction, the court told the jury, that if they believed the avulsion occurred, and that certain other facts existed, then they would, under the evidence in this record, and not under any treaty, or decision of this Court, but simply and solely upon the

evidence introduced, find a verdict for the defendant.

The defendant, plaintiff in error, did not seek to raise a Federal question; did not seek to try this cause out upon the ground that it contained a Federal question, which would, of necessity, have to be decided ultimately by this court; but what plaintiff in error did do was to submit to the court of Coahoma County, the question of its rights, under the record, as made in that court; and what was determined on that record is *res adjudicata* of what was there decided, and of that, and nothing more.

This court does not sit, as an ultimate arbiter to compel litigants to choose how they will conduct their controversies. There is, under the law of Mississippi, a well defined principle, that where parties elect to adopt a principle as a rule of law, for the trial of their issues, and to make their issues determinable by the rule so thus adopted, neither party can complain of the binding effect of such rule.

Van Oss v. Insurance Company, 63 Miss., 431. **Wilson v. Zook**, 69 Miss., **Clisby v. M. & N. O. Ry. Co.**, 78 Miss., 948; **Hitt v. Terry**, 92 Miss., 672.

We frankly state that, ordinarily, the existence of a Federal question is determined, not by the way in which it is decided, but by the fact that it was decided; but, in the instant case, there was no attempt to have a Federal question raised, and no dispute as to any Federal question; but, upon the evidence in this case, each party sought a verdict on such evidence, and not upon the treaties, and not upon the judicial knowledge of the court, without any effort at continuance, then we say that there is an estoppel—a local question.

Counsel, with deference, is in error, when he states that the trial court took judicial knowledge of the Federal nature of the boundary line. The lower court submitted many questions of fact to the jury for decision, and, in

Mississippi, it is expressly provided by Section 793, Code 1906,

“The Judge in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of the evidence, but, at the request of either party, shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement.”

And plaintiff in error did not ask a judicial definition under the judicial knowledge of the court. So every instruction was asked by plaintiff in error as a predicate for a verdict in its behalf; the predicate therefor, a belief from the evidence in this case; and in no part of the evidence in this cause was there ever any reference to any Federal question whatsoever.

Jayne v. Nash, 66 So., 813, in no way impairs **Thomas v. Wyatt**, 17 Miss., 309; on the contrary, it directly reaffirms the decision and overturns counsel's contention. The judgment in **Jayne v. Nash** was against both principal and surety, and thereby, the surety became, in the circuit court, a party to the record; as such, the judgment was against him; and the Court held, very properly, that being a party to the record, he could not be a surety upon the appeal bond to the supreme court. Under the statute of Mississippi, any person may appeal; Section 33, Code 1906, whether principal or surety. Under Section 43, Code 1906, it is expressly provided how the proceedings shall be conducted in the supreme court, and how any party who fails to obey the summons thereunder issued, shall not, thereafter, have a right of appeal, and “the judgment or decree of the court below shall remain in force against them.” To the principal or surety the statute prescribed the effect where there is a failure to join in the appeal, and the result is not left to judicial construction.

True the supreme court of Mississippi has said that a surety on a bond in the trial court is not a necessary party to an appeal but only because any party may, under the statute, appeal irrespective of the act of any other party, but the supreme court of Mississippi expressly held, in the Nash case:

“The judgment appealed from is a **joint judgment** against appellant and the sureties on his appeal bond, and, by executing this bond, these parties simply obtained a supercedeas of the judgment against them, so that, in truth and in fact, all of them are principals and the bond contains no real sureties.” (*Italics ours.*)

The decision being that under the Mississippi practice there is a joint judgment against them, they would be necessary parties to a writ of error proceeding, were there no statutory amendment, as is now the case in Mississippi. Appeals may be taken by any party, writs of error being expressly abolished. Code Sec. 32. The problem presented is therefore under this decision, a joint judgment against the Rust Land & Lumber Company and the United States Fidelity & Guaranty Company, in the circuit court of Coahoma County, wherefrom, under the local practice, the Rust Land & Lumber Company has alone appealed, whereby, under Section 43, the judgment against the United States Fidelity & Guaranty Company has become final; being a necessary party to a review of the judgment in this court, can plaintiff in error, without the presence of the United States Fidelity & Guaranty Company prosecute this writ of error?

It will be perceived that, as authority, the Nash case refers to 2 Cyc. 831, which shows a contrariety of judicial opinion and will explain the cases from Texas and Florida. The Federal cases rest upon the admiralty practice, and, with deference, are not pertinent.

Estes v. Trabue, 128 U. S., 229, is a Mississippi de-

cision, and, directly denies the contention of plaintiff in error, that the judgment here is severable and separate; and, further, directly holds that the sureties upon the bonds are essential parties, this Court saying:

“But there is another difficulty in the present case, which cannot be reached by an amendment in or by this Court, under Section 1005. The judgment is distinctly one against the claimants and C. F. Robinson and W. J. Dillard, their sureties on their forthcoming bond, jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as a separate judgment against the claimants, and another separate judgment against the sureties, or, as containing a judgment against the sureties on, and enforceable only, on a failure to recover the amount from the claimants; an execution is awarded against all of the parties jointly.”

Which is the identical case here and is conclusive against the plaintiff in error, both upon the necessity of the sureties being present, and upon the proposition that this is a severable judgment. Judgments in Mississippi are entireties.

Comenitz v. Bank, 85 Miss., 665.

The other party against whom judgment was rendered in the State Supreme Court is not before this Court and hence for the reasons assigned in the original brief upon this motion it should be sustained.

POINTS ON THE MERITS.

I.

Plaintiff in error failed to prove title below the high water mark on the Arkansas side.

II.

Plaintiff in error failed to prove the locus of the thread of the stream at the time of the avulsion.

ARGUMENT.

I.

Plaintiff in error failed to prove title below high water mark on Arkansas side.

The possession having been forcibly taken by plaintiff in error the burden of proving title rested on it. The several states adjudicate, as local questions, the ownership of beds of navigable streams within their boundaries. **Archer v. Greenville**, 233 U. S., 68. **Packer v. Byrd**, 137 U. S., 661. **St. Louis v. Routz**, 138 U. S., 442.

Under the right thus vouchsafed, Arkansas has fixed the termination of private riparian ownership at high water mark.

State v. Parker, 200 S. W., 1014; **Sand Co. v. State**, 192 S. W., 380; **Johnson v. Quarles**, 182 S. W., 283; **Material Co. v. State**, 180 S. W., 219; **Patrick v. Steinkle**, 100 Ark., 36; **Barbaro v. Boyle**, 108 S. W., 379; **R. R. Co. v. Ramsey**, 8 L. R. A., 559.

In **Arkansas v. Tennessee**, 246 U. S., 158, the Court said:

“Arkansas may limit riparian ownership by the ordinary high water mark (**St. Louis I. M. & S. R. Co. v. Ramsey**, 53 Ark., 314, 323; **Wallace v. Driver**, 61 Ark., 429, 435, 436;) and Tennessee, while extending riparian ownership upon navigable streams to ordinary low water mark, and reserving as public the lands constituting the bed below that mark (**Elder v. Burrus**, 6 Humph., 358, 368; **Martin v. Nance**, 3 Head, 648, 650; **Goodwin Thompson**, 15 Lea, 209, 54 Am. Rep. 410), may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in

State v. Muncie Pulp Co., 119 Tenn., 47, 104 S. W. 437. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located."

By the record, ownership of plaintiff in error is shown to sections 22 and 23 containin 69.40 acres, and no more.

"And it is further agreed that the title in fee simple to Section 22 and Section 23, all in Township 4 South, Range 4 East, in Phillips County, Arkansas, is vested in the Rust Land & Lumber Company, defendants in this cause." (R. 7.)

This agreement does not apply to **accretions**; if the land in question were surveyed as a part of Arkansas it would be found, not in Sections 22 and 23, but, on the contrary, in Section 21 and Section 28, to which no title whatever is shown upon the part of plaintiff in error.

A fundamental fact is that, beginning many years ago, and continuing to the present, taxes have been paid by plaintiff in error only upon Sections 22 and 23, aggregating 70 acres, beginning with a value in 1894 (R. 98) at \$70, and culminating in 1917 with a value of \$275.00.

In the petition for a written opinion, plaintiff in error says that "Horseshoe Island is a tract of approximately three or five thousand acres; worth, with the timber upon it, Fifty Thousand Dollars." (Rec. 172.)

And yet, plaintiff in error is content to pretend to discharge its obligation to the state upon an assessed value of \$275.00, and an acreage of 70 acres.

A reference to the briefs in the Supreme Court of Mississippi, Appendix I, demonstrates that this is the point upon which that Court may have decided this case. It called for an explanation upon the part of the plain-

tiff in error, of a delinquency, which counsel for plaintiff in error did not vouchsafe to the state court. Why is plaintiff in error entitled to the protection of the state court for \$50,000 worth of property, 5,000 acres in extent, when they pay taxes to the state upon 70 acres, which they have solemnly had assessed at \$275.00!

This court, in common with the courts of Mississippi, attaches great importance to the payment of taxes as being an element in the assertion of ownership. **McCaughn v. Young**, 85 Miss., 277, quoting to approve **Holtzman v. Douglass**, 168 U. S. 278. See, also, **Native Lumber Company v. Elmer**, 78 So. 703. This failure in itself was sufficient to decide the case against plaintiff in error.

POINT II.

The plaintiff in error failed to prove the locus of the main navigable channel of the stream at the time of the avulsion.

The burden of proof being upon plaintiff in error, there is, in this record, no evidence whatsoever as to the location of the thread of the Mississippi River, as defined in **Arkansas v. Tennessee**, 246 U. S., 158 at the date of the avulsion. **Cissna v. Tennessee**, 246 U. S., 289; **Arkansas v. Tennessee**, U. S. Advance Opinions (1917), 680.

Plaintiff in error undertook as a matter of fact, to locate this line on the trial, and herein lies one distinction between **Cissna v. Tennessee**, and the instant case. The State of Tennessee sued **Cissna** in a court of equity, setting up the ownership of all that portion of the dry land, formerly a part of the bed of the Mississippi River, lying between the low water mark on the Tennessee side and the middle of the river as it flowed prior to the avulsion.

Cissna pleaded, in abatement, that the land described in the bill, was located in Arkansas, and not in Tennessee, and, hence, the court was without jurisdiction. The lower court sustained the plea and ordered the

suit dismissed. Here, no plea in abatement was interposed.

In the Cissna case, the supreme court of Tennessee held that the rule laid down by this court in *Iowa v. Illinois*, 147 U. S. 1, should **not** be followed, and, thereupon, on remand, the pleadings were amended so as to allow a recovery to the middle of the channel, as it existed in 1823. Here there was no such refusal to follow any decision of this court nor did the state court as above shown pass upon any such question.

The State of Arkansas filed its bill in this Court against the State of Tennessee, to settle the boundary line between these two states. The pendency of that action was brought by Cissna to the attention of the trial court and made the basis of an application for a stay of proceedings until the boundary line between the states should have been fixed by this Court and the fixing of the boundary decided that case but wont decide this one.

This application was overruled and the cause proceeded with in the Cissna case on the merits, which on appeal, was affirmed. Now, this Court took jurisdiction, the decision of the Supreme Court of Tennessee, averse to Cissna involved essentially Federal questions. But in this instant case, there was not drawn in question, any controversy between plaintiff in error and defendant in error, as to the correct decision in *Iowa v. Illinois*, 147 U. S., 1. The courts are at one upon the law in this aspect. Both the defendant and the plaintiffs, in their instructions did not in any way make an issue upon the difference in the law as laid down in this Court and as adopted in the Cissna case. There is no attempt here to define what channel i. e. the steamboat or that equidistant between the banks was meant in the instructions of either plaintiff or defendant and if the plaintiff in error desired to have this cause determined, by the location of the boundary between Arkansas and Mississippi, by a decision of this Court, it should have objected at the

trial of the cause until the decision in the case of *Arkansas v. Mississippi* had been handed down.

It is not permissible for a litigant to experiment with the courts; to take a chance of winning, and then when such party loses, to assign, as error, his own act.

In short, the boundary line between Mississippi and Arkansas was at the date of this proceeding, unknown to either plaintiff or defendant, and as shown did not concern either party, as the plaintiff in error has shown no title below highwater mark on the Arkansas shore, and, thereupon, without reference to the determination of any case in this Court, as a question of fact, there was a determination, upon evidence introduced by the respective parties before the Coahoma County Court, as to the ownership of this timber. Plaintiff in error was given this instruction (more favorable than it should have received) thus: "The Court instructs the jury for the defendant that, if they believe, from the evidence, that the body of water shown on the map introduced in evidence in this case and called "Old River" or "Pecan Lake" is between the Mississippi shore and the land on which the timber in controversy in this suit was grown, and that this body of water **was the last channel of the river, as it dried up**, between the Island and the shore of Mississippi, and that the said land on which the said timber was grown is not attached to the Mississippi shore, or any accretions formed or attached thereto, then the Court will find for the defendant." (*Italics ours.*)

The boundary line was the thread of the navigable channel at the date of the avulsion under the decision of this Court. After that date, the boundary between Arkansas and Mississippi was irretrievably fixed, wherein, consider *State of Arkansas v. State of Tennessee*, *supra*, where this Court said:

"By the avulsion of March 7th, 1876, which resulted in the formation of a new channel, known

as the Centennnial Cut-off, the boundary line between said states was unaffected and remained in the middle of the former main channel of navigation, as above defined. The boundary line between the said states should now be located along that portion of the bed of the said River that was left dry as the result of such avulsion, according to the middle of the main navigable channel, as it existed at the time the current ceased to flow therein, as the result of said avulsion."

This instruction is diametrically opposed to the settled rule in this court. **Cissna v. Tenn.**, 246 U. S., 289; **Arkansas v. Tennessee**, 246 U. S., 158, for, as said therein, "It is settled beyond the possibility of dispute, that, where running streams are the boundaries between states, the same rule applies as between private properties, namely, that when the bed and channel are changed by the natural and gradual process known as erosion and accretions, the boundary follows the varying course of the stream, while, if the stream, from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may have flown therein, and, irrespective of subsequent changes in the new channel." **New Orleans v. United States**, 10 Peters, 662, 717; **Jeffries v. East Omaha Land Co.**, 134 U. S., 178-189; **Nebraska v. Iowa**, 143 U. S., 359, 361, 367, 370; **Missouri v. Nebraska**, 196 U. S., 23, 34, 36.

So, plaintiff in error received an instruction more favorable than it was entitled to receive under the decisions of this Court, and plaintiff in error submitted to the jury of Coahoma County, as a question of fact, upon the evidence then introduced, the proposition as to the title to this timber and lost. There was no definition of the boundary directly or indirectly by the trial court

that in any wise conflicted with any decision of this Court.

Plaintiff in error did not introduce before the jury, any of the treaties in question; did not rely upon the judicial definition by the court of the boundaries, but submitted to the court a question of fact for the jury to determine, **as a question of fact**, upon the evidence which was then before the court—simply that and nothing more.

No effort was at the time made by the plaintiff in error to put before the jury of Coahoma County, anything with reference to what might or might not be decided in this Court. The counsel for plaintiff in error was careful to tell that jury under what circumstances they could find for it. Counsel in the court below did not seek to have the jury pass upon, as a settled fact, that which will be determined by this Court, when the case of *Arkansas v. Mississippi* is decided. The Supreme Court of the State of Mississippi, thereupon following the decision of *Clisby v. M. & O. R. R. Co.*, 78 Miss., 937, could have affirmed this judgment upon the ground that where there is the trial, and instructions are asked by each party, predicated the law to be the same, thereafter, neither party can assail the rule of law by which the case was tried, irrespective of how erroneous that rule of law may have been. *Van Oss v. Insurance Company*, 63 Miss., 431; *Wilson v. Zook*, 69 Miss., 700; *Hitt v. Terry*, 92 Miss., 672.

The Circuit Court of Coahoma County tried this case as one wherein all the evidence, pro and con, had been introduced. Plaintiff in error did not ask for a continuance upon the ground that the decision made by this Court would be in any way material, and it is not to be tolerated that he should take chances of winning his case upon this evidence before that court, and then, after he has lost trifle with the judiciary, by claiming that the theory upon which that trial was had is erroneous, and that the court *a quo* should take judicial knowledge of a boundary that was subsequently to be established when

by its conduct the determination of its location was not essential. Of course, if plaintiff in error had won this case, and the jury had believed his witnesses, that might have been an end of the controversy. But, when it lost the case, it now seeks to inject therein, as a federal question, that which was not considered by the court below, and to which, **at the proper time**, the plaintiff in error made no reference.

If plaintiff in error desired to rely upon the decision of this Court and the fixation of the boundary by this Court, and as an essential factor in the cause, that the Circuit Court of Coahoma County was compelled to take judicial knowledge of that boundary, then the plaintiff in error should have presented these several things to that court, and not attempted to get a decision from that court upon evidence which has been discredited by a jury.

The location of the meander line of the Mississippi in 1833 is definitely given and the locus in quo wherefrom the timber was cut was in lot 1, section 11, T. 28, S. 5 W.; as the ownership of the riparian owner extended to the thread of the stream. *Archer v. Greenville*, 233 U. S., 68; and the plaintiff in error having failed in the circuit court of Coahoma County to prove where the thread of the navigable stream was at the time of the avulsion, that court should, as a matter of law, have determined that the presumption was that the line was equidistant between the two visible banks of the Mississippi River. *State v. Keane*, 84 Mo. App. 130.—

“But the expression that the boundary will remain in the center from bank to bank of the old river bed is correct in all those cases where no showing has been made of where the navigable channel was. For in the absence of proof on that subject, it will be taken to be in the center of the old bed located from bank to bank. *Creasy's First Platform on International Law*, Sec. 231, *Iowa v.*

Illinois, *supra*. But where the old channel is located, as in this case, the presumptions which obtain, in the absence of evidence, gives way."

Iowa v. Illinois, 147 U. S., 1.

There is no proof at the avulsion in 1848, that there was more than one navigable channel, or that the navigable channel varied from the dividing line equidistant from the fixed shores, and the burden of proof being upon plaintiff in error to so establish the existence of such a navigable channel, failing therein, the burden imposed upon it by a wrongful act was not met and judgment went for plaintiffs.

In 1817, an island is shown in the center of the Mississippi River and there is no proof that between the date of 1763 and 1817, the navigable channel did not run between this island and Arkansas. If it did, thereby this island became a part of the Mississippi territory, and Mississippi jurisdiction thereafter would not have been lost by the subsequent changing of the channel; if, subsequently, accretions formed therefrom they would be a part of Mississippi territory.

Missouri v. Kentucky, 11 Wallace, 395; **Indiana v. Kentucky**, 137 U. S., 508.

And plaintiff in error, with this burden of tracing the main navigable stream, by his evidence, wholly failed to connect up the island in question, so as to show that this island was not on the Mississippi side, and that these accretions to the West did not form from this island, and not from the mainland.

The fundamental error running throughout the brief of learned counsel, both in this Court and the Supreme Court of Mississippi, is the failure to note that at the date of the avulsion, the doctrine of accretion ceased to operate; and that after the avulsion occurs, there is a fixed and definite line, which line does not vary, even though

the old river should become dry, as was the case in **Arkansas v. Tennessee**, supra, and that plaintiff in error wholly failed to connect its property up with this line—its ownership stopping at high water mark.

By an avulsion, the boundary line between two states become fixed, there ceases to operate at once, the doctrine of accretion between the sovereignties in question **Arkansas v. Tennessee**, supra; **Cissna, v. Tennessee**, supra; **Missouri v. Nebraska**, supra; **Nebraska v. Iowa**, 143 U. S., 361; **Jeffries v. Land Co.**, 134 U. S., 178.

Counsel cites two cases, **Truly v. Golden**, 117 Mo. 33; **Benechke v. Welch**, 67 S. W. (Mo.) 604; neither of which, in any way, conflicts with anything herein contended for.

Counsel cited, as conclusive, the case of **Nix v. Pfieffer**, 73 Ark., 179; but, in that case, when reported in 83 S. W., it is declared:

“The river line is a natural boundary, and its gradual advance or retard carries the owner’s line with it, except in case of avulsion, or sudden and perceptible change of the water course, in which latter case, the line remains at the old water line and becomes fixed by it, not subject to further change by the caprice of the river.”

R. R. Company v. Ramey, 53 Ark., 314; **Wallace v. Driver**, 61 Ark., 429; **St. Louis v. Rutz**, 138 U. S., 226; **Nebraska v. Iowa**, 143, 359.

Furthermore, the bed of the rivers in Arkansas is held by the State in trust for the public.

State v. Parker, 200 S. W. (Ark.) 1014.

Sand Company v. State, 192 S. W. (Ark.) (1917) 380.

Johnson v. Quarles, 182 S. W., 283;

Material Companies v. State, 180 S. W. 219.

Counsel is in error in stating that the abandoned channel did not dry up after the avulsion of 1848.

Charley McGhee testified expressly that it was dry, and that in 1857, when the water came, it was washed out by a break there in the levee.

What the caprices of the Mississippi River are, no living man can tell, and while experts theorized upon the formation, this old negro was upon the ground, and his testimony was brought out by plaintiff in error upon cross-examination without any knowledge, upon the part of the defendant in error as to its existence and he was directly supported thereafter by Harry Malone.

Furthermore, we submit that the decision could be affirmed upon the ground of adverse possession. Our statement was challenged.

It will be seen that the land in question is subject to annual overflow, being between the Mississippi Levee and the Arkansas Levee. It further appears that it is covered with a dense growth of cotton wood trees, and is therefore incapable of actual physical possession.

The rule of law as to adverse possession in Mississippi is found in **McCaughn v. Young**, 85 Miss., 293, and **Elmer v. Native Lumber Co.**, 75 So., 703.

Adopting these decisions as controlling, we have to submit, as evidence of adverse possession, in answer to counsel's challenge, the following:

“Q. Who has been in actual occupation of that land during all of the time claiming it as theirs?

“A. Same parties claiming it now.

“Q. That you bought the timber from?

“A. Yes sir.

“Q. What, if any, dispute about it, did you ever hear?

“A. No, sir, none at all.

“Q. Who claimed to own that land to you there at that time, adversely to the world.

“A. King and Anderson, Ellen Jackson and Joe Williams.

“Q. The parties you bought the timber from?

“A. Yes, sir.

We submit the manner of the taking of the timber from these ignorant negroes by physical force and threats of depotation, unless they at once surrendered claim, is such conduct as would deprive the plaintiff in error, without the clearest proof of actual ownership of any right in the premises.

To think of a Company in this free United States, to take from a helpless and ignorant race, that for which they had paid full value, and upon which they had labored three weeks, under threat that if they did not give it up, they would be taken care of by being incarcerated for exercising the privilege of laboring in their own behalf (R. 8-9), especially so when that Company had not seen fit to have said land assessed for taxes and to pay taxes on it!

The possession, according to Zanders Parker (R. 8), had continued for 17 years.

It appears that the witnesses for plaintiff in error stated that this timber was surrendered willingly. Thus: “He served the papers on them and told them that they ~~cl~~asen’t go over and molest that timber any longer, that I was taking charge of the timber, and they were satisfied.”

It appears from the evidence that the very next day, a writ of replevin was issued upon the negroes’ complaint.

“Q. Where you cut this timber you had been in notorious, adverse and uninterrupted possession of this land where you cut this timber for about ten years past?

Defendant objects to that, because it is a conclusion.

(The Court): I overrule the objection.

Defendant excepts.

“Q. Who has been in possession of this land?

“A. Charley McGhee and Joe Williams.

“Q. Claiming it as their own?

“A. Yes, sir. (R. 17.)

Which last answer was objected to and sustained.

“Q. What, if any, acts of possession, Isom, did Charley McGhee, King and Anderson and Ellen Jackson and Joe Williams, the owners in Section 11, with whom you had a contract to cut this timber exercise over this land where you cut the timber?

“A. They had claimed it for twelve years to my knowledge.

“Q. What had they done in there, if anything?

“A. Yes, sir, got them some fire wood off of there.

“Q. What else?

“A. That is all.

“Q. Had they sold any timber in there that you know of?

“A. Yes, sir.

“Q. They had sold timber?

“A. Charley McGhee had sold some.

“Q. Who did he sell it to?

“A. Mr. Hull.

“Q. How long ago has that been?

“A. It has been twelve years.

“Q. Has Charley and the rest of them been in possession since then?

“A. Yes, sir. (R. 18).

They have all the land on the South of the Lake in cultivation and reside there, so that a possession of a part of the locus in quo, under claim of title, would operate as an adverse possession of the entire tract. (R. 21).

Charley McGhee testified that the land in question had been surveyed by Mr. Houston before he bought it and that the lines ran out to near what is Dustin Pond, something over a quarter of a mile.

“Q. What acts of ownership have you and Ellen Jackson and King and Anderson, and Joe Williams ex-

exercised over this particular land where the timber was cut, during the past ten or twelve years between Pecan Lake and Dustin Pond, where you saw this timber was cut, what acts of ownership have you done; what have you done to them?

"A. What I have done with that land?

"Q. Yes.

"A. The timber?

"Q. Yes.

"A. Been cutting it and using it from over there.

"Q. What have you done with reference to selling any?

"A. May have sold some of it from over there.

"Q. Who did you sell it to?

"A. Sold to Mr. Leavenworth....good many years ago.

This witness further testified he sold timber to Mr. Hull ten or twelve years ago. (R. 26).

Mr. Hill, the surveyor, ran out the lines of the land here claimed. (R. 27).

This is in direct contradiction to the testimony of plaintiff in error, that no timber had at any time been cut by other persons. Furthermore, under the well settled rule where land is in a swamp, so that actual possession cannot be had, and the timber, as here, constitutes the sole value, that the use of the "timber constitutes adverse possession of the locus in quo.

McCaughan v. Young, 85 Miss., 294.

There is a direct and palpable conflict in the evidence upon all of these points, and the burden of proof upon the plaintiff in error, with confidence, we submit, was ample proof of such possession as would constitute adverse possession.

It will be noted that as to land of this character, that when the only use of which it is capable is the en-

joyment of the timber, that a life tenant may, without being guilty of waste, cut the timber. Thus making the cutting of the timber, substantially, equivalent to the use of the land.

See **Balentine v. Poyner**, 2 Hay. 110; **McCauley v. Land Co.**, 2nd Rob. Va., 57; **Campbell v. Clark**, 2 Daney (Mich.), 143.

Counsel states: "The testimony, on the contrary, shows the lands in question were in the possession of plaintiff in error, and that no claims were made by others until the trespasses involved in this case occurred. (R. 49, 53 and 121).

It is true that this testimony is there and supports counsel's statement, but it is directly contradicted by that for the defendants in error hereinbefore noted, that they claimed and owned the land in question, and therefore, that question having been solved by the jury, of necessity, counsel's contention cannot here be sustained.

Furthermore, it appears that counsel claims, not only the land where he avers the old Mississippi bed was, but, also, where there is now Horseshoe Lake or old river, and that there is controversy and conflict further on.

We admit, that under the decision of this Court in **Arkansas v. Tennessee**, that the contention that the line is equi-distant between the physical banks, under all circumstances, is overruled, but, in the instant case, such decision does not, with deference, conflict with the possession for which we contend, because plaintiff in error has wholly failed to locate said navigable thread of the stream, which navigable thread of the stream is wholly immaterial, as hereinbefore pointed out; because plaintiff's in error right never came nearer than a half mile, and, even, as hereinbefore stated, if it were found that this land were in Arkansas, that would not in any way determine the case for plaintiff in error, but would only sub-

ject defendants in error to a liability for cutting this timber, to the State of Arkansas.

Wherefore we respectfully submit that this writ of error should be dismissed for the reasons set forth in both the original and supplemental briefs upon this point, and if not, then that it should be affirmed because—

(1) The burden of proof was upon the plaintiff in error to show title to the timber in question and therein it failed.

(a) As it showed no title below the high water mark upon the Arkansas shore.

(b) It failed wholly to show the thread of the navigable stream at the date of the avulsion, and in the absence of such showing, the presumption is that it was equidistant from the fixed banks.

(2) The Supreme Court of the State of Mississippi did not pass upon a Federal question but determined this case upon the broad principles of local law, with reference to

(a) Adverse possession,

(b) Estoppel by asking and obtaining similar instructions,

(c) Failure to show title based upon payment of taxes.

All of which are purely local questions and ample to sustain this decision.

Damages are asked at 10 per cent.

Respectfully submitted,

Marcellus Green
Gerald Fitz Gerald
George F. Maynard
James H. Green

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APPENDIX I.

I, George C. Myers, Clerk of the Supreme Court of the State of Mississippi do hereby certify that the following pages printed herein numbered...37...to...115... contain a full true and correct copy of the briefs of counsel for both appellant and appellee in the cause of Rust Land & Lumber Company v. Ed Jackson et al, No. 17,835 upon the docket of this Supreme Court of the State of Mississippi and that the only omissions therefrom are quotations made from the authorities cited. That the complete arguments submitted in writing therein appear and that the originals thereof are upon file in my office.

Witness my signature this 31 day of October, 1918.

Signed: Geo. C. Myers
Clerk Supreme Court
By H. J. Brown, D.C.
E.L.S.:

IN THE
SUPREME COURT OF MISSISSIPPI

RUST LAND & LUMBER COMPANY

v.

ED JACKSON ET AL.
BRIEF FOR APPELLEES.

The questions involved necessarily requiring elaborate preparation, and the cause having been set peremptorily for October 16th, and no brief for appellant being now on file, (October 1) we herewith present the argument upon behalf of the appellees.

This suit comes from the Circuit Court of Coahoma County, wherein appellees brought replevin for certain cotton wood logs which they had severed from the land, of which the appellees claimed to be the owners, and of which logs appellees were deprived by force and fraud executed upon them (who were ignorant negroes) by the petty officials of Phillips County, Arkansas, at the instance of appellant. The merits of the controversy were fully submitted to a jury, and, as a result, a verdict rendered for appellees, whereunder all of the testimony introduced by appellant was substantially discredited as unworthy of credence. We submit:

POINT I.

The cause having been submitted to a jury, the judgment should be affirmed.

action of replevin. See, also, **May v. Rockett**, 25 Miss., 241.

Hence, appellees having had the actual possession, which actual possession was unlawfully invaded by appellant, the right to maintain replevin existed unless appellant could connect itself with the paramount title of one shown to be the lawful owner.

It appears that these sections in Arkansas were laid out in 1817, and contain only 68.70 acres; furthermore, a large island at that time existed **which was not platted as a part of the State of Arkansas**. Presumably, the thread of the stream threw this island into the State of Mississippi because not surveyed upon the west side of the river. The United States next surveyed the land in Mississippi, about 1833, when we have a definite location of the lots to which appellees claim title, and even upon the map made by appellant, a portion of the timber was cut from land which formed a part of Mississippi and which was surveyed in 1833 as a portion of Lot 1. These lots had their lines fixed; were located at that date and have been located in this case beyond a reasonable doubt, and having been so located upon the Mississippi river, we turn to the rights of riparian ownership incident thereto.

RIPARIAN RIGHTS IN MISSISSIPPI.

The local decisions control as to riparian rights. **Archer v. Greenville**, 233 U. S. 68; **Packer v. Bird**, 137 U. S. 661; **St. Louis v. Rutz**, 138 U. S. 242; **Kaukauna v Canal**, 142 U. S. 271; **Shiveley v. Bowlby**, 152 U. S. 44; **Hardin v. Jordan**, 140 U. S. 371; **Transportation Co. v. Mobile**, 187 U. S. 482.

A riparian owner in Mississippi owns to the thread of the stream—**usque ad filum**—subject only to the paramount public right of passage which disappears upon reliction or recession of the stream.

The first decision in Mississippi defining said rights was **Morgan v. Reading**, 3 Smed. & M. 397. (Quotation therefrom).

Commissioners v. Withers, 29 Miss., 33, stresses merely the paramount public right, but quotes to adopt the *Magnolia* cases as enunciating the correct doctrine.

The question again came before our court in **Magnolia v. Marshall**, 39 Miss., 109, wherein will be found one of the most luminous opinions appearing in our reports. (Quotation therefrom).

Again, in **Railroad Company v. Frederick**, 46 Miss. 9. (Quotation therefrom).

These decisions were approved in **Boom Company v. Dixon**, 77 Miss., 592, and were subject to review by the Supreme Court in **Archer v. Greenville**, 233 U. S. 68, where the reasoning is commended and the learning approved, and in virtue of which that court applied the rule hereinbefore set forth.

Now, the *Magnolia* cases were decided many years ago, and were lawful when made, and in virtue of their terms, contracts have been made, and these decisions have entered into all contracts made as rules of property, to impair which lies beyond the power of this Court. As said in **Lumber Co. v. State**, 97 Miss., 598. (Quotation therefrom).

Such were appellees' constitutional rights.

OF THE WESTERN BOUNDARY OF MISSISSIPPI.

Note the development as delineated in Code of 1857, where it is said: (Quotation therefrom).

Since that date, the Constitution, Sec. 3, has so expressly fixed the boundary.

Furthermore, under the joint resolution of Congress approved January 26, 1909, power is given Mississippi and Arkansas to deal with the question of boundary. In 1848, the record shows an avulsion cutting across the head of a horse-shoe that had theretofore existed, and as hereinafter shown, the riparian rights were to be irrevocably fixed. It appears from the evidence of the appellees, that Pecan Lake did not exist at that time, but had its being through a washout in July, 1857, prior to which time said land was not only in Mississippi, but was surveyed and lotted by appropriate numbers in Section 11, Township 28 North, Range 5 West.

Furthermore, the record shows no change between 1833 and 1848, which was a lapse of only fifteen years, and even the exhibit for appellant (conceded to be in no way accurate) shows the Mississippi at this point to flow directly north.

Furthermore, the river then, and ever since, has been approximately three-quarters of a mile wide which, taken as a standard, we have a question in issue as we have the question of the right to cut timber at a point exhibited to the jury, but which, by laches upon the part of the appellant, does not appear to this Court in any form. Herein we include the discredited exhibit.

Furthermore, this court knows judicially that in cutting timber, under no possibility could it be cut in a regular geometrical figure, and taking these factors, this Court must affirm under **Bunckley v. Jones**, 79 Miss., 1, by reason of the appellant's failure to present here the entire record. But taking the shore, even as surveyed by appellant, and extending from that shore one-half the distance of the average width of the river, viz., three quarters of a mile, we have included within our riparian ownership all of the lands upon which the trespasses were committed, conceding even them to be in the shape

claimed by appellant. Further, our admission of title in appellant did not extend further than to Sections 22 and 23, Township 4, Range 4, which contain 68.70 acres, and which were assessed at \$275.00, and it is conceded that these 68 acres do not embrace the land in question upon which the timber was cut, or any part thereof.

Furthermore, no taxes have been paid upon anything more than this 68 acres, and presumably the State of Arkansas still continues to hold its title under the peculiar law incident to that state, whereby, contrary to the rule in Mississippi, the state retains title to the beds of all streams.

Railroad Co. v. Ramsey, 8 L. R. A. 559; **Barboro v. Boyle**, 108 S. W. 379; **Session Laws**, Ark. 1895, p. 207.

In **Polack v. Steinke**, 100 Ark., 36. (Quotation therefrom).

Southern Sand etc. Co. v. Attorney General, 180 S. W. 219.

Again, taking the probable shore of Arkansas in 1833, it is apparent that all of the timber was cut upon the Mississippi side of the thread of said stream, only to which our rights are paramount. This quite apart from whether Dustin Pond was or was not the old bed of the river, or whether or not said Pecan Lake was washed out in virtue of a broken levee as claimed. Upon appellant's map even, a creek is shown to almost join Pecan Lake on the west, and while great stress is laid thereon, yet it appears from the map itself and must be noted here.

**THE BOUNDARY BETWEEN SECTIONS 22 AND 23,
TOWNSHIP 4, RANGE 4 EAST, AND THE LAND
OF APPELLEES, SECTION 11, TOWN-
SHIP 28, RANGE 5 WEST.**

We have (a) An avulsion in 1848, 15 years after the survey by the United States in Mississippi, whereby the

neck of the horse-shoe formerly existing was cut through, and the bed of the Mississippi river changed, whereby the water ceased to flow through the old channel and thereafter, to the present day, has plowed through the channel then cut, so as to make the land here in controversy upon the east side of the Mississippi river. (b) The average width of the Mississippi River is shown to have been in this locality three-quarters of a mile. As to its general course, it was formerly at the point in question running almost north and south, and when the avulsion occurred, the location of the thread of the stream is such as to make it absolutely impossible to ascertain where the steamboat channel lay and it would probably have been very close to the Arkansas shore, because such would have been the shortest and most direct route. At any rate, it is left uncertain and must therefore be assumed to be equidistant from the banks which then existed and whose location at the present time can be defined with reasonable accuracy. (c) Appellant is the owner only of Sections 22 and 23, containing 68.40 acres, while appellees are the owners of all of the lots in Section 11 fronting upon the river, which contain, as surveyed, a part of the land upon which this timber was cut, and which contains absolutely on the Mississippi side all of the land in question. With these admitted facts admitted, we pass to a consideration of the establishment of the line, wherein consider:

(1) Avulsion fixes absolutely the boundaries at its date which do not thereafter vary. A most luminous discussion of this point is found in **Nebraska v. Iowa**, 143 U. S., 361, where the court said. (Quotation therefrom).

This decision has been consistently followed.

See **Shively v. Bowlby**, 152 U. S. 1, 38 L. Ed. 344.

In **Missouri v. Nebraska**, 196 U. S. 23, 49 L. Ed. 375, the court said: (Quotation therefrom).

See, also, **New Orleans v. United States**, 10 Pet. 662; 9 L. Ed. 594; **Missouri v. Kentucky**, 11 Wall. 395, 20 L. Ed. 116; **St. Clair County v. Lovington**, 23 L. Ed. 63.

The Supreme Court of Arkansas has reached as to the boundary between Mississippi and Arkansas, the same conclusion as our Court.

Cessill v. State, 40 Ark. 501; **Deloney v. State**, 88 Ark. 313; **Wolf v. Arkansas**, 104 Ark., 43.

It thus appears that this proposition has been settled for many years, and can the appellees be deprived of their property by one whose land lies on the Arkansas side of the river, when said appellant has not any title to any portion of the bed of the stream below low-water mark, and has absolutely failed to prove would-be low-water mark in this case. It affirmatively appears that appellees have only possession of a number of acres to which their deeds would give them title, plus the title to the middle of the Mississippi river, as embraced within the calls of their deed.

Authorities *supra*, especially **Morgan v. Reading** and **Magnolia v. Marshall**.

Now, when the survey of Arkansas was made in 1817, the island appears a short distance above the land in controversy, which island was neither meandered or surveyed as a part of the State of Arkansas, and from the map and plats, we respectfully submit that the principal channel of the Mississippi river lay between Arkansas and this island which, therefore, constituted a part of the original Mississippi territory, and became both in ascending and descending the river the shortest and quickest channel, for the steamboats would lay between the island and the Arkansas shore, otherwise a long detour would have been requisite. Said island, not having been meandered, we respectfully submit, belongs to

Mississippi, and the right of accretion could have no applicability where the boundary embraces land and not water.

Missouri v. Kentucky, 11 Wall. 395, 20 L. Ed. 116.

The rights of Mississippi having therefore attached in 1817, and having been conveyed to appellees, we respectfully submit that appellant is wholly without right in that regard.

Turn to the township map of Township 4, Range 4, and the acreage will be shown to be 56.33 and 12.07 acres, respectively, in Sections 22 and 23. It thus appears that these sections were surveyed down to the hundredth part of an acre, and the bank of the Mississippi was carefully meandered, and no other or further sections were located in said Township 4, Range 4. The island to which we have made reference would constitute a portion of Sections 25 and 26 had they been surveyed, but no such sections appear, and no survey made by the Government indicates their existence, and Arkansas being the owner of all land lying in the bed of the stream, appellant's rights are certainly without foundation.

Arkansas v. Ramsey, *supra*; **Barber v. Boyle**, *supra*; **Polack v. Steinke**, *supra*.

Had, however, this United Surveyor conceived this island to be a part of Arkansas, he would have undoubtedly surveyed it and assigned it a section number in this township and range. All things are presumed to be done justly and rightly; especially so after a lapse of one hundred years, and after by the filling in of the channel between the State of Arkansas and this island, this island become joined to the main land of Arkansas, it did not thereby in any way become a portion of Sections 22 and 23, but existed as an independent parcel, the title to which is vested in the State of Arkansas, and

with which appellant has shown not the slightest connection, even if our contention that it is a part of our riparian ownership should be denied, which we respectfully submit cannot be done upon this record.

Appellant occupies the unenviable attitude of demanding protection from the courts, when in making contribution to the government for the support of its rights, it returns 68 acres at the valuation of \$275.00, and yet claims thousands of acres, in this instant case, with a valuation for a part of the timber alone running into thousands. Note the effect of failing to pay taxes upon them whereof ownership is asserted. Were the bed of the stream the property of the State of Arkansas, no taxes would be due, but if this land were not the bed of the stream and were what we cannot conceive to be the case a part of Sections 22 and 23, we would have appellant confronted by a wilful failure to bear the just burdens of the Government, and such failure would almost of necessity argue the nonexistence of the rights. Under the Code of Mississippi, Section 4264, it was requisite, if appellant claimed any of the land within this state, to make return thereof for taxation. Such return seems not to have been made, but if the land in question were in Arkansas, and were in the bed of the stream, then it would have been exempt from state taxation as the property of the sovereign, and under **McCaughn v. Young**, 85 Miss., 277, the failure to pay taxes to the state, and the failure to have this property assessed, becomes most powerful evidence of the fact that appellant was not the owner of said parcel. In that case the court said: (Quotation therefrom).

This failure can only be explained upon the basis of fraud upon the State of Arkansas.

Allegans suam turpitude nem est audiendus.

Coke's Fourth Institutes, 279.

And while the courts of law are not closed absolutely to those who come with unclean hands, yet the maxim that he who has done iniquity shall not have equity is not without its application to the law side of the docket, and here we find a course of conduct which would be a fraud if appellant were allowed to claim it, but we submit that when it is possible to so construe his acts to be both legal and illegal, it is the duty of the court to construe said acts to be legal, and when the courts have by their course of conduct fixed a certain interpretation upon their rights, that is the State of Arkansas and the appellant, that such interpretation, so thus fixed between Arkansas and appellant, will have a most powerful influence in determining the extent of appellant's right as against the appellees, especially when said rights have been found to be non-existent by a jury who saw the witnesses face to face and found their testimony not to be credible.

It appears furthermore that the only point upon which—not the appellant—but the State of Arkansas, could seek to overthrow the presumption created after this lapse of time would be to establish that the thread of the Mississippi river moved westward by accretion, and yet upon this point there is no evidence. Furthermore, it was requisite to have shown that this movement occurred anterior to the avulsion of 1848, when the river promptly dried up by reason of the cut off.

It will be perceived that the river so making a cut off has, through the cut off, a much shorter channel, and as pointed out in *Stockley v. Cissna* 119 Tenn., 152, had the effect of rendering the river bed dry land. Therefore, we have what was at one time confessedly within the territory of Mississippi and actually surveyed as such by the United States, and then we have an avulsion at a time when there are no witnesses in existence who can speak as to conditions and show that the line of Mississippi was in 1848. The only point in evidence is that

there was a cypress brake here subsequent to 1848. That existing as a fact, the title became then fixed at the center of the abandoned channel of the Mississippi river, and after that neither party could lose anything by accretion. The court may take a rule and using as a base the surveyed line laid down in 1833, and all of the land here in controversy even as claimed by appellant will be found well within the dividing line of the center of the Mississippi river, and admitting therefore for the sake of argument that the alleged cuttings occurred where they have been placed, still this would put them over a mile from any land to which the appellant is shown by this record to have title. The only land that appellant has title to consists of Sections 22 and 23, which two sections are located this distance from the land whereupon the timber was cut, and now we insist that the law of the State of Mississippi will protect the possession of the appellees when such possession was peaceable and has been unlawfully invaded without color of right in the premises by one whose nearest approximation to a right consists in the ownership of land over a mile away when the State of Arkansas has confessedly at all times retained the title to the bed of its streams. The burden of proof being upon appellant by reason of the peaceable possession of the appellees, and the actual invasion of such possession by the appellant, who stands as a trespasser, the appellant is without right in the premises, and cannot hope to succeed because it has failed utterly to connect itself at any point with the title of either the appellee or the State of Arkansas, who alone have been the true owners of the property in controversy. Note **Stockley v. Cissna**, 119 Tenn. 152, where an identical case was decided by that court. Among other things, the court said. (Quotation therefrom).

It appears that the State of Tennessee brought an action against the Pulp Company (119 Tenn. 56) predicated its right so to do upon its ownership of the bottom of the Mississippi river when said bottom became dry in

virtue of an avulsion. The propositions involved there demonstrate that if the appellees have no title, then that the title is vested in the State of Arkansas who alone could complain. Said decision is so luminous that we insert it at length: (Quotation therefrom).

We submit this decision as absolutely conclusive in the annihilation of any pretense of right upon the part of appellant. Its reasoning is unanswerable, and having under consideration the precise question now presented, there decided on its merits, we ask this Court to adopt this decision in its entirety, and thereby preclude, as to the Arkansas side of the river, any assertion of right by any one save the State of Arkansas.

It happens that upon the same controversy a suit was filed. *Stockley v. Cissna*, 119 Fed. 812, where Mr. Justice Lurton delivered, also, a most learned opinion covering in large measure the same ground but his reasoning is so cogent that we take the liberty to adopt his opinion also as a part of our brief. (Quotation therefrom.)

It will be perceived that the decision of this Court is not concerned with any fact, further than that the cutting of this timber was done in the bed of the Mississippi river. That point being established, and it must be conceded almost, then and of itself appellant's case falls under the decisions, as to the Mississippi side, of **Morgan v. Reading**, 3 Smedes & M. 397; **Magnolia v. Marshall**, 39 Miss., 109, and as to the Arkansas side, under **Polack v. Steinke**, 100 Ark. 36, where the Court said: (Quotation therefrom).

In addition to this, appellees have title to the timber herein controversy as demonstrated in the Pulp Company case, first, by reliction; second, by the fact that the parties appealing have no right in the premises further than to highwater mark. The property of appellant never

touches the property of the appellees. Between the two, there is always interposed that which was the half of the Mississippi river at the time of the avulsion. Appellant did not acquire title to this, but under the settled rule in Arkansas, its title stopped at the highwater mark. This is made manifest by the fact that the assessment of Sections 22 and 23, of Township 4, Range 4, is only 70 acres, and the point is thus laid down in *St. Louis etc. R. Co. v. Ramsey*, 8 L. R. A. 569, where it is said: (Quotation therefrom).

Furthermore, in *Barboro v. Boyle*, 108 S. W. (Ark.) 379, that Court said: (Quotation therefrom).

Later it made the same ruling in *Southern Sand etc. Co. v. State*, 180 S. W. (Ark.) 219, S. C. 167 S. W. 854, wherein a decision was had with reference to sand located in the bottom of the stream. Note that by Session Acts 1895, 217, that this property is perhaps given to the county. The record does not show that was the highwater mark in 1848 on the Arkansas side. To arrive at that point, it is essential to have evidence produced, which evidence certainly has not been found. The right of appellees to the timber under the Mississippi decisions is forcibly demonstrated in *Archer v. Greenville*, 233 U. S. 60, 58 L. Ed. 850, where it was expressly held that whether the title to the beds or streams vests in the riparian owner is a question of local law, and that in Mississippi the riparian owner has title to the thread of the stream.

Now, directly the reverse is true in Arkansas. The title of appellant is no further than the highwater mark, and, therefore, at the time of the avulsion the ownership was fixed between the parties at the highwater mark then existing, and as demonstrated in the Tennessee case, the state, and not the individual, owns the bed of the stream. The proposition was not an accretion; it was an avulsion, and by an avulsion, as settled in all of the

cases, the title does not in any way change, but on the contrary is fixed irrevocably, and an accretion after an avulsion does not confer title because the avulsion has fixed the boundaries beyond the power of change.

Therefore, for this invasion, replevin lay by appellees even though as against the State of Arkansas, we might not (conceding our contention to be ill-founded as to the location of the cutting) have been entitled to recover. Taking the water mark as delineated even upon the map introduced by appellant, and it is fully three-quarters of a mile from its nearest point to the point at which these trees were cut, and between these two points, either the appellees have title or the State of Arkansas has title, in neither event has the appellant a cause of action. These rules of law have been fixed for many years.

Rober v. Michelsen, 82 Neb., 49; **State v. Bowen**, 135 N. W. 494; **Iowa etc. Land Co. v. Coulthard**, 96 Neb. 610; **In re City of Buffalo**, 99 N. E. 852; **Marks v. Sambrano**, 170 N. W. 547; **State v. Keane**, 84 Mo. App. 130.

The actual dividing line between the fixed banks must be taken as the boundary between appellees and the State of Arkansas, and upon this point, there being no evidence at this date by which the location of a steamboat channel could be made, the middle of the river, equidistant from each bank would be fixed as the dividing line.

Suffice it to say, upon this point, in this case, there is no conflict of authority, because there is shown by **State v. Keane**, *supra*, that where the location of said principal steamboat channel does not appear, it will be presumed to be at a point equidistant between the fixed banks. This will be shown by an examination of **Iowa v. Illinois**, 147 U. S. 1, where the Supreme Court of Illinois had

reached one conclusion and the Supreme Court of Iowa had reached another. But in the instant case, Arkansas and Mississippi seem to agree, and therefore the usage having been found by the parties affected, the Supreme Court, under its express decisions, will be bound thereby.

Again, the middle is presumed *prima facie* to be at a point equidistant from the banks. This is shown by the quotation from Creasy on International Law at page 8 in the aforesaid opinion of *Iowa v. Illinois*, and furthermore, there being this *prima facie* presumption, and the width of the Mississippi being fixed, there is no way to overthrow it. Again, we notice that the theory in question applies to a condition where there are no islands, for the Supreme Court there expressly quoted to approve this quotation: (Quotation therefrom).

So that in the instant case, we feel that this Court will treat with respect the prior decisions of this tribunal which have been declared by the Supreme Court of the United States in *Archer v. Greenville*, 233 U. S., 68, quoting to approve the 6th edition of Kent's Commentaries, and containing "a frank and manly support of the binding force of the common law, on which American jurisprudence rests."

Furthermore, the Supreme Court of the United States in that very decision, with reference to our *Magnolia* case, said: (Quotation therefrom).

Wherefore, we respectfully submit that the judgment in this cause should be affirmed.

GREEN & GREEN,
Attorneys for Appellees.

We hereby certify that we have delivered to Messrs. Wilson & Armstrong a copy of the foregoing brief before filing the same.

GREEN & GREEN.



IN THE
SUPREME COURT OF MISSISSIPPI

OCTOBER TERM, 1916.

RUST LAND & LUMBER COMPANY,

Appellant.

v. No. 17,835.

ED. JACKSON, ET AL.

Appellees.

**STATEMENT OF CASE, BRIEF AND ARGUMENT
ON BEHALF OF APPELLANT, RUST LAND
& LUMBER COMPANY.**

STATEMENT OF CASE.

The parties are referred to in accordance with their status in the lower court, appellees as plaintiffs and appellant as defendant.

This is an action of replevin for cottonwood timber, instituted in the Circuit Court of Coahoma County, (Record p. 6).

This timber grew upon accretions formed by the Mississippi River, and the status of these accretions is the narrower question involved.

For a presentation of the questions raised, a description of the locus in quo is first essential. The jury's verdict having been in favor of the plaintiffs, all evidence offered by them is accepted as true, together with all reasonable inferences that may be drawn from this evidence. The facts will be stated in favor of plaintiffs as strong as can possibly be warranted by the record.

It is difficult, if not impossible, to visualize the situation presented without the aid of a map. Defendant's map, Exhibit No. 4, was by uncontradicted evidence shown to be correct, and will be referred to for illustrative purposes. A substantial reproduction of this map is attached to this brief as Exhibit "A" to same. Prior to 1848, immediately below Friars Point, Mississippi, the Mississippi River made a bend in the shape of an ox bow, running first South, then West, then North. In that year (1848) it cut across the head of the bow, where would have been the yoke and by this avulsion, straightened itself. (Maps Exs. Nos. 3, 23, 24 and 26.)

The present conditions are as follows:

On the what was the South end of the bend (called Horseshoe Bend) of the Mississippi River previous to 1848, there is now a large body of water, crescent shaped, and occupying practically the same position as did the river prior to 1848, or at least the Southern part of the River (Map Ex. 4 R. Pages 13, 57, 66, 172, 204.)

There was an official government survey of the State of Mississippi, in 1833-1835. The Mississippi shore of the river as meandered in that survey runs through the standing body of water above referred to, which is locally known as "Old River" on account of the fact that it is reputed to have been the bed of the Mississippi River at the time of the cut off. (R. Pages 13, 57, 66, 172, 204).

The Mississippi shore of 1833-35 is a little further

North than the present shore of "Old River," showing that the river must have cut South between 1835 and 1848, and thus have cut into the Mississippi shore. (Map Ex. 4) (R. pp. 57, 126).

"Old River" as now existent is a body of water, crescent shaped, about three to four miles long, 850 feet wide and twenty feet deep in its deepest places. It occupies what was the bed of the river prior to the cut off. From either end of it, (the N. E. and the N. W. ends) to the present Mississippi River is a well defined channel, which would fall within what was the bed of the river in 1833-1835 prior to the cut off.

Map Ex. No. 4; R. pp. 13, 29, 49, 58, 59, 75, 76, 108, 130, 132, 134, 199, 200, 205).

On the South, or Mississippi Shore of Old River, is a high well defined bank, while the bank on the North, or Arkansas Shore is flat and ill defined. Crossing "Old River" from North to South (from Arkansas Shore to Mississippi shore) the water gradually gets deeper, attaining its maximum depth next to the Mississippi shore.

(R. pp. 13, 42, 43, 55, 58, 59, 66, 67, 75, 111, 112, 189, 190, 198, 206).

About one-half mile North of Old River is a shallow slough like body of water, locally known as Dustin Pond. This body of water on the West is connected with "Old River" with a water connection probably artificial. (R. pp. 14, 48, 49, 137, 135, 136).

Dustin Pond is about 1-4 as wide as "Old River," is extremely shallow, has flat marshy banks on both sides. At its Eastern end, as a defined channel, it tapers into nothingness about half way across the interior body of land embraced within the arms of "Old River,"

though one witness insists that in times of high water there are slight indications of a former channel extending further East. (R. pp. 14, 48, 137, 77, 88, 99, 105, 110, 198, 201; Map Ex. 4, 206, 209).

The Southern shore of Dustin Pond is well timbered with old timber, which becomes gradually smaller as one goes South approaching "Old River," culminating in willows upon the North bank of that body of water. (R. pp. 79, 109, 161, 189, 197, 205).

This is the topography of the locus in quo as revealed by the record.

By stipulation, it appears that certain persons are the owners of Lots 1 to 9 inclusive of Section 11, Township 28, Range 5 West in Coahoma County, Mississippi, and that "the plaintiffs herein had the right and authority from said owners to cut the standing timber on said lots within the calls of said owners deeds."

(R. p. 8).

It was also stipulated that title in fee simple to Sections 22 and 23, Township 4 South, Range 4 East in Phillips County, Arkansas, was defendant, Rust Land & Lumber Company.

(R. p. 8).

The land so stipulated as being owned by plaintiff's vendors is part of the original Mississippi shore as the same existed prior to 1835, and is on the South side of "Old River" just South and East of its Southermost point. (Map Ex. 4).

The land so stipulated as being owned by defendant is part of the original Arkansas shore, embraced within the ox bow bend of the river before the cut off, as shown

by the official government survey of Arkansas of 1816. (Map Exs. 4 and 23).

The timber involved was by plaintiff cut on the North side of "Old River" within the ox bow, between Old River and Dustin Pond. The locality where the timber was cut is colored pink upon the map Exhibit 4, and bears the legend "2780 ac. Trespass." (Map Exhibit 4, R. pages 10, 13).

Plaintiffs insist that this timber was cut from accretions to the land of their vendors in Section 11, Coahoma County, Mississippi. Defendant insists that it was cut from accretions to its lands in Sections 22 and 23, Phillips County, Arkansas.

After plaintiffs cut the timber, it was taken possession of by defendant as it lay upon the ground; and thereupon, the plaintiffs were employed for about thirty days by the defendant and assisted in getting the timber into "Old River" and binding it into a raft in order that defendant might transport it. (R. pp. 17, 21, 26, 30, 66).

The timber having been placed in "Old River," this replevin suit was instituted by plaintiffs and possession obtained of the timber. Defendant filed a bond and regained possession. (R. pp.).

The case was tried at Friars Point, Mississippi before His Honor, Judge T. B. Watkins, and a jury, and a verdict rendered in favor of plaintiffs and against defendants, for \$3,600.00, this being the amount fixed by the jury as the value of the timber. (R. pp. 231).

Appellant has perfected its appeal and assigned its errors. It is not necessary here to repeat them verbatim. The questions they raise are:

First; The question upon whom was the burden of

proof to show a right to the possession of the timber.

(A). The court instructed the jury for the plaintiffs that if they cut the timber in good faith by authority of their vendors who **claimed** the lands from which it was cut as accretions to their lands, “and the defendant by threats or intimidation took the timber away from them, then the plaintiffs have made out a prima facie case, and it devolves upon the defendant to show by a preponderance of the evidence that it is the **owner** of the land from which the timber was cut before defendant can recover in this case.” (R. p. 224, Sixth Assignment of Error).

(B). For the plaintiffs the court further instructed the jury, “that unless the Rust Land & Lumber Company has shown to the satisfaction of the jury, by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company, in the State of Arkansas, or was North and East of the Channel of the Mississippi River where the cut off in 1848 occurred, then they will find for the plaintiffs.” (R. p. 224, Seventh Assignment of Error).

(C). The court refused an instruction requested by defendant to the effect that plaintiffs could not recover “unless the proof shows by a preponderance of the evidence that the timber was cut growing on the lands belonging to the grantors or of their plaintiffs or some of them.” (R. p. 230, Tenth Assignment of Error).

Second; The question of whether defendant was entitled to a direct verdict. (R. pp. 8, 22, 228. First, Second and Eighth Assignments of Error).

BRIEF.

PROPOSITIONS OF FACT.

I.

The articles replevied consisted of timber severed from realty, of which plaintiffs did not have actual adverse possession. (R. pp. 10, 13, 17, 21, 26, 30 and 66).

II.

After defendant took possession of the timber, plaintiffs entered its employ and worked for thirty days, assisting defendant to perfect its possession of the timber. (R. pp. 17, 21, 26 and 30).

III.

The land from which the timber was cut is North of what was the main channel, that is the deep water channel of navigation of the Mississippi River prior to 1848. (R. pp. 29, 42, 43, 49, 57, 58, 59, 75, 108, 130, 132, 134, 172, 189, 190, 199, 200 and 205).

IV.

The land from which the timber was cut was joined to defendant's land by the gradual recession, or reliction of the waters. (R. pp. 13, 42, 43, 55, 58, 59, 67, 75, 79, 109, 161, 189 and 197).

PROPOSITIONS OF LAW.

I.

The burden of proof was upon plaintiffs to show their right to possession.

Mississippi Code, 1906, Sec. 4214.

Buck v. Payne, 52 Miss., 271.
Austin v. Terry, 88 Pac., 198.
Brunson v. Volunteer Carriage Company, 93 Miss.,
793.

II.

The instructions, stating that the defendants could only prevail in case they proved ownership to the land, were erroneous because plaintiffs not being in possession, could only recover provided they showed ownership to the land.

Shinn on Replevin, Sec., 280, Note 80 Am. State Rep. 741; Note 69 L. R. A., 732.

Richbourg v. Rose, 44 Southern 69, (Fla.)

Lieberman, Loveman & O'Brien v. Jas. N. Clark, 114 Tenn., 117. Note 89 Am. Decisions, 427.

Cobby on Replevin, 2nd Ed., page 354.

Wells on Replevin, Sec. 73.

North Shore Boom & Driving Co. v. Nicomen Boom Co., 101 Pac., 48, (Washington).

Hungerford v. Redford, 29 Wis., 345.

David Hart v. G. W. Vinsant 6 Heis., 616, 53 Tenn., 616. Note 69 L. R. A., 732.

The plaintiffs being merely on the land for the purpose of cutting timber, were not in adverse possession of the land.

Cobby on Replevin, 2nd Ed., Sec. 88.

Ellsworth v. McDowell, 44 Neb., 707, 62 N. W., 1082; 89 Am. Decisions 427.

Phillips v. Gastrell, 61 Miss., 43.

III.

The instruction set out in the sixth assignment of

error, stating that the defendant could not prevail, unless it showed itself to be the owner of the land, was erroneous because defendant was in any event entitled to prevail if it showed itself to be an actual occupant of the land. See authorities *supra* under II.

IV.

Plaintiffs having assented to defendants possession and assisted in perfecting it, thus recognized the rightfulness of defendant's possession, and are not entitled to maintain an action of replevin.

Benjamin B. Frizzell v. John White, 27 Miss., 198.

Taplin v. Wilson, 6 N. Y., Supreme Court (Thompson & Coate) 502.

V.

The land on which the timber was cut, being North of the thread or deep water channel of the river as it ran prior to 1848, was within the State of Arkansas, and this prevented plaintiffs having any title to the land.

Hendley's Lessee v. Anthony, 5 Wheat., 374.

Iowa v. Ill., 147 U. S., 1.

Mo. v. Neb., 196 U. S., 23.

Louisiana v. Mississippi, 202 U. S., 1, 49.

Moore v. McGuire, 203 U. S., 214.

Washington v. Ore., 211 U. S., 127.

Washington v. Ore., 214 U. S., 205.

Iowa v. Ill., 147 U. S., 1.

Keokuk & Hamilton Bridge Co., v. Ill., 175 U. S., 625, 631.

Louisiana v. Mississippi, 202 U. S., 1.

Iowa v. Ill., 202 U. S., 59.

Washington v. Oregon, 211 U. S., 127.

Washington v. Oregon, 214 U. S., 205.

St. Louis v. Rutz 138 U. S., 226.

Neb. v. Iowa, 143 U. S., 359.

Mo. v. Neb., 196 U. S., 23.

Mo. v. Kansas, 203 U. S., 78.

VI.

The water having gradually left the defendant's land, and thus the land from which the timber was cut having been joined to defendant's land, title to this land was in defendant.

Warren v. Chambers, 25 Ark., 120, 4 Am. St. Rep. 23, 91 Am. Decisions, 538.

Harrison v. Fite, 78 C. C. A., 147, 148 Fed., 781.
(Circuit Court of Appeals for 8th Circuit).

Naylor v. Cox, (Mo.) 21 S. W. 589.

Nix v. Pfeifer, 83 S. W. 951, 73 Ark., 199.

Barboro v. Boyle, 178 S. W., 378 (Ark.)

ARGUMENT.

**Sixth, Seventh and Tenth Assignments of Error
Burden of Proof and Plaintiff's Right to Maintain an
Action of Replevin.**

On the threshold of this case, one is met with the question of upon whom was the burden of proof to show a right to the possession of the logs involved. Another phase of this question is whether or not—aside from defendant's right to the logs—plaintiffs have shown a right in themselves to maintain an action of replevin.

The matter can, perhaps, most succinctly be presented by referring to the general rules of law governing the right to maintain a suit for replevin, and the burden of proof in such cases, and then applying those rules to the facts of this particular case.

Let it be remembered that the question here involved is the right to maintain an action of replevin for articles **severed from the realty**. This question has been the subject of decision in many analytical opinions. As a result, the principles involved are established with a degree of great definiteness.

An action of replevin, being a possessory action, always and everywhere, the one essential question involved is the right to possession. "It is axiomatic that a party who sues in replevin must have the right of immediate possession either in virtue, of a general property as owner, or a special property as bailee at the time he sues."

Buck v. Payne, 52 Mississippi, 271.

To the same effect is the Mississippi Code of 1906, Section 4212, which provides that in actions of replevin, the affidavit must provide "That he, (plaintiff) is entitled to the immediate possession" of the property replevied. It is equally axiomatic the the burden of proof is on the plaintiff to show his title and right to possession. He must recover, if at all, "upon the strength of his own title, and not upon the weakness of that of his adversary."

Austin v. Terry, 88 Pac. 189.

Brunson v. Volunteer Carriage Co., 93 Miss., 793.

In actions where the articles sought to be replevied have been severed from the realty, the action of replevin cannot be used to try title to the realty. The true rule is that if any one is in actual adverse possession of the realty, by virtue of this possession he has possession of articles severed from the realty. This possession is suf-

ficient to entitle him to maintain the action of replevin against trespassers, against those not in actual adverse possession of the land. The true owner cannot maintain the action of replevin for timber cut from the realty, as against one in actual adverse possession.

Where, however, there is no actual adverse possession of the land, as where the land is wild and unenclosed, the question of title to the realty is necessarily involved incidentally because the constructive possession is in the true owner of land. Where, therefore, the land is wild and unenclosed, in an action of replevin for timber severed from the land, that party prevails who shows the title to the land in himself, because being thus the owner of land not in adverse possession of any one else, he has constructive possession of the land, and ipso facto constructive possession of the timber severed from the land. Where neither party is in possession of the land, and where neither party can show an actual title to the land, then plaintiff in replevin suit for timber severed from the land must be cast, because the burden of proof is upon him to show the right to possession of the articles involved in the suit. In such case, he has not actual adverse possession of the land, which would give him actual possession of the timber severed. He has no actual title to the land, which would give him constructive possession of the timber severed. This constructive possession is in the true owner, whoever he may be, and thus, the plaintiff, having failed to meet the burden upon him of showing a right to possession, cannot prevail. These principles are supported by numerous authorities:

See Shinn on Replevin, Section 280. (Quotations therefrom).

Note 80 American State Reports, 741, 758. (Quotations therefrom).

69 L. R. A., 732—Note. (Quotation therefrom).

Richbourg v. Rose, 44 Southern 69 (Fla.) (Quotation therefrom).

See also Note 89 American Decisions, 427.

These authorities establish the rules when there is any possession of the land. But the rules when the land is not in actual possession of any one are equally well established. Although the authorities hold that ordinarily, the question of title to the land is not involved in a replevin suit, as said by the Supreme Court of Tennessee. (Quotation therefrom).

Hart v. Vincent, 6 Heis, 616:

“Even (in) such a case evidence of title is permitted ‘not for the purpose of trying the question of title to the land,’ but for the purpose of determining the question of possession.”

Lieberman, Loveman & O'Brien v. James N. Clark, 114 Tenn., 117.

Note 89 Am. Decisions, 427-431: (Quotation therefrom).

Cobby on Replevin (Second Edition) Sec. 7, p. 354. (Quotation therefrom).

Section 73, Wells on Replevin.

As illustrating these principles, it was held in North Shore Boom & Driving Company v. Nicomen Boom Company, 101 Pac. 48, (Washington), that where logs which floated out of the boom were received by defendant, and replevied by plaintiff, who maintained the boom, in that in as much as plaintiff was a trespasser, and in maintaining the boom he could not replevin the logs regardless of

whether or not the title was in defendant. The Court said:

“Yet, the plaintiff in a replevin case must prove his right to the possession of the property demanded. It is not sufficient to show that defendant is not entitled to possession. The pertinent question is whether the proof sustains the plaintiff's claim, or right to possession.”

Another pertinent case is *Hungerford v. Redford*, 29 Wis., 345, from which we excerpt: (Quotation therefrom).

A more closely analogous case to the one at bar is that of *David Hart v. G. W. Vinsant*, 6 Heis., 616, 53 Tenn., 616. The facts in that case were: (Quotation therefrom).

For a general discussion of these principles, see the elaborate note in 69 L. R. A., 732. In regard to what is actual adverse possession of the land so as to give one a right to maintain the action of replevin, it is well settled that:

“A possession of property obtained by trespass cannot be made the basis of an action of replevin.”

Cobby on Replevin, Second Edition, Section 88, citing *Ellsworth v. McDowell*, 44 Nebraska, 707, 62 N. W., 1082. (Quotation therefrom).

Note 89, *American Decisions*, 427, 430.

This question has, in fact, been foreclosed by this Court in the case of *Phillips v. Gastrell*, 61 Miss., 43, wherein it is held that the mere fact that one has camped upon land and cut timber, was not adverse possession of

the land by that one; and wherein, it was further held that under such circumstances, the true owner had a right to maintain replevin. These authorities then established the following principles:

1st. The burden of proof is upon the plaintiff in an action of replevin to show his right to possession.

2nd. In an action of replevin for articles severed from the realty, that person is entitled to prevail who has actual adverse possession of the realty, which carries with it the possession of the article severed.

3rd. If no one has actual adverse possession of the realty, then the title may be inquired into, and the true owner must prevail, because in the absence of adverse possession, he has constructive possession of the realty, and ipso facto constructive possession of the articles severed from it.

4th. Where neither the plaintiff, nor defendant in an action of replevin for articles severed from the realty can show actual adverse possession of the realty, or actual title to same, then the defendant must prevail because the plaintiff has failed to meet the burden the law puts upon him to show the right to possession.

Applying these principles to the facts of this case, we find the only proof in the record in regard to any title of plaintiff's vendors is that:

"The title in fee simple to lots 1 to 9 inclusive of Section 11, Township 28, Range 5 West in the County of Coahoma, State of Mississippi; Tennessee." (R. p. 8).

The stipulation further provides that:

"The plaintiffs herein had the right and au-

thority from said owners to cut the standing timber on said lots within the calls of said owner's deeds." (R. p. 8).

It is not contended by any one that any of these lots extend to the North of "Old River," where the timber was cut. It is fully shown by the map, "Exhibit 4," that these lots bordered on the South bank of "Old River." It also clearly appears by uncontradicted evidence that neither plaintiffs nor their vendors ever had any actual adverse possession of the occupancy of this land where timber was cut. One of the plaintiffs testified as follows:

(Isom White, R. p. 23)

Q. What, if any, acts of possession, Isom, did Charlie McGhee, King & Anderson and Ellen Jackson and Jo Williams, the owners in Section 11, with whom you had a contract to cut this timber, exercise over this land where you cut this timber?

A. They had claimed it for twelve years to my knowings.

Q. What had they done in there, if anything?

A. Yes sir, got them some firewood off of there.

Q. What else?

A. That's all."

(See also R. pp. 61 and 62).

Plaintiffs did not even camp on the land when they cut the timber, but made forays across "Old River," returning to their homes at night. Under the holdings of *Phillips v. Castrell*, *supra*, it is, therefore, clear that there was no adverse occupancy or possession of the land, either in plaintiff's vendors, or plaintiffs themselves.

After the timber was cut, it was left lying on the land, where it was felled, and was there when taken possession of by defendant. Plaintiffs were not present when the timber was taken possession of by defendants, but were on the South Side of "Old River," at their homes in Coahoma County, Mississippi. (R. pages 10, 15, 25, 65).

This fully appears from the following testimony of one of the plaintiffs:

(Testimony of Zanders Parker, R. p. 16).

"A. Yes sir, we cut it between Pecan Lake and Dustin Pond.

Q. It was there that these gentlemen came to you?

A. They came to me on this side of the levee, over home there where I live at.

Q. Where was this timber then?

A. Where we cut it.

Q. You were not there where the timber was when they came to you?

A. No sir."

In fact, the high water was then rising and about to reach the timber. The situation is thus detailed by same witness:

(Testimony of Zanders Parker, Record p. 17):

Q. Did you turn it over to Mr. DeSha?

A. Yes sir, we didn't bother it any more.

Q. Did he pay you anything for cutting it?

A. No, sir.

Q. What sort of an agreement did you make with him about rafting it, you and these other parties?

A. We were to put it out to the lake and raft it for a dollar a thousand.

Q. Out into the river for a dollar a thousand?

A. Into the lake.

Q. Well, was the water up then, or low water stage then?

A. When?

Q. When this conversation occurred?

A. Well, the water was just rising, coming in there then.

Q. Hadn't gotten over to where the timber was cut?

A. It had reached some of it."

Plaintiffs, therefore, were not even on the land when possession was taken of the timber by defendant, but were across "Old River" in the State of Mississippi; whereas, the timber had been left lying where felled with the rising water about to reach it. It fully appears from the record that the presence of the sheriff, with the agent of defendant, was intended as a warning against future trespass; and that the timber was not actually taken out of the plaintiff's possession, because it was left lying on the land, of which they had no possession; and was in no sense in their possession.

After the defendants took possession of the timber, all of the plaintiffs assisted the defendant in fixing its possession of the timber, binding it in the form of a raft, and getting it into "Old River," working on this for about a month. (Record pages 17, 20, 26, 27, 29, 30 and 66).

We have, therefore, certainly a case where the plaintiffs were not in actual adverse possession of the land, nor had they any possession of it, and where yet they are seeking to maintain an action of replevin for timber severed from it. In such a case as we have already seen, they can only maintain the action by showing that title to the realty, from which it was severed, was in them.

It was not insisted in the lower court, and will not, we suppose be insisted here, that the undisputed evidence shows that title to this realty was in plaintiff's vendors, on account of it being alleged to be accretions to their land. The most that has ever been insisted in this regard is that the question of the ownership of plaintiff's vendors, was a question of fact for the jury. And yet, in this situation, the plaintiffs showing no possession to the realty, nor title to it, and seeking to maintain an action of replevin for timber severed from it, the learned Trial Judge instructed the jury that if the plaintiffs cut timber in good faith by authority of their vendors, who claimed the lands from which it was cut as accretions to their lands, and the defendants by threats, or intimidation took the timber away from them, "then the plaintiffs have made out a prima facie case; and it devolved upon the defendant to show by a preponderance of the evidence that it is the owner of the land from which the timber was cut before the defendant can recover in this case." (R. page 224).

The Court further instructed the jury that unless the defendant had:

"Shown to the satisfaction of the jury by a preponderance of the evidence that the lands from which the timber in controversy was cut was a part of the accretions, belonging to the Rust Land & Lumber Company, in the State of Arkansas, or was North and East of the channel of the Mississippi River, where the cutoff in 1848 occurred, then they will find for the plaintiffs." (R. page 234).

The Court refused an instruction requested by the defendant in that plaintiffs could not recover:

"Unless the plaintiffs show by a preponder-

ance of the evidence that the timber was cut growing on the lands belonging to the grantors of these plaintiffs, or some of them." (R. page 220).

The giving of these two instructions for the plaintiff was manifest error, because they directed the jury to return a verdict for plaintiff, unless the defendant by a preponderance of the evidence showed itself to be the owner of the land, from which the timber was cut, whereas, the true rule is that the plaintiffs, having cut timber from the land of which neither they, nor their vendors has possession could only maintain an action of replevin for such timber by themselves showing by a preponderance of the evidence that the title was in them, or their vendors. This results from the rule above stated, that where timber is cut from unoccupied land (pretermitted for the present the question of defendant's possession) an action of replevin can only be maintained by that person who shows true title to the land, because of the fact that the constructive possession of the timber is in the true owner of the land who has constructive possession of the land, in the absence of any actual adverse holding against him, and where no true title is shown either in plaintiff, or defendant in a replevin suit, the plaintiff must be cast because he has failed to meet the burden of proof, with which the law **onerates** him.

The instructions requested by defendant should have been given, because it clearly states the law certainly as favorably as it could be stated for the plaintiffs. This instruction is to the effect that plaintiffs could not recover unless they show that true title to the land was in them, or their vendors. This is the rule, because they having the burden of proof to show a right to possession and having no actual adverse possession of the land, can only meet this burden by showing title and constructive possession of the land either in themselves, or their vendors, regardless of whether or not either the true title, or the actual possession was in defendant.

We take it that it will not be insisted by learned adversary counsel that there is any evidence in the record that actual adverse possession of the land was in plaintiff's vendors, because there is absolutely nothing in the record to sustain such an insistence. But if this insistence should be made, the result would be simply that it would have been a question of fact for the jury, as to whether or not the land was in the actual possession of the plaintiff's vendors, and the instructions given for the plaintiff, and hereinbefore referred to, would still be erroneous, because they flatly state that the burden of proof was upon the defendant to show title to the land, and if the question of possession were one of fact for the jury, these instructions could not have been correct, unless prefaced by the proviso that such burden of proof was upon defendant, provided plaintiff showed actual adverse possession of the land.

For the reasons above set out, therefore, the giving of the instructions complained of in the sixth and seventh assignments of error, and the refusal of the one set out in the tenth assignment of error were material errors. In addition to the matters already urged under these assignments of error, however, the instruction complained of in the sixth assignment of error is manifestly erroneous for another reason. In that instruction, the court instructed the jury that if plaintiffs cut the timber in good faith, by authority of their vendors, who claimed the lands from which they cut as accretions; "and the defendant by threats, or intimidation took the timber away from them, then the plaintiffs have made out a prima facie case, and it devolves upon the defendant to show by a preponderance of the evidence that it is the OWNER of the land from which the timber was cut before the defendant can recover in this case." This instruction declares the law to be that when one cuts timber under claim to it, and is himself the plaintiff in a replevin suit for this timber, he can only be defeated

by the defendant showing that he was the owner of the land from which the timber was cut.

We have already seen that this is not the law, and that everywhere, and under all circumstances, in order for one either to defeat, or maintain an action of replevin for timber severed from the realty, it is only necessary for that one to show not that he was the owner, but that he had the actual possession of the land when the timber was cut. Even, therefore, if the burden of proof had been upon defendant to show his right to the timber, this right could have been shown by showing actual occupancy and it was not necessary to show actual ownership. This instruction, therefore, operates the defendant with a heavier burden than the law imposes, and is for that reason vitally erroneous.

There is in the record ample evidence sufficient to go to the jury upon the question of the defendant's occupancy and adverse possession of the land at the time the timber was cut. The defendant has, on the body of land known as Horseshoe Island, three cleared and fenced fields. One of these fields is entirely upon the original Arkansas shore, and has been leased and cultivated for many years; one is partially upon the original Arkansas shore, and partially upon the accretions, and one is entirely upon the accretions between Dustin Pond and "Old River," close to where the timber was cut. (R. pages 69, 72).

This field so located between Dustin Pond and "Old River," close to where the timber was cut, had been enclosed in wire fence for about six or seven years at the time the timber was cut. (R. pages 81, 212, 213). In addition, the defendant has in its employ a caretaker, who has charge of this entire tract of land, including that part in which the timber involved in this case was cut. This man goes over these lands about once a month. (R.

pp. 204, 206, 110). Whenever any timber has blown down by wind, the defendant has removed it and sold it; and whenever any timber has been threatened on account of caving banks, or any other reasons, the defendant has protected it and conserved it. (R. pp. 80, 210). Defendant has always treated anyone entering the land, or cutting timber, or for any other purpose as trespassers. (R. 207, 208); and in fact, the situation is thus expressed in the language of one of the defendant's witnesses:

“I can only tell for the last four years, during that time it, (defendant) exercised full control over the entire island up to the North bank of “Old River.” (R. p. 160).

It is to be remarked that this land was timber land between the levee and the river, and subject to overflow. It is further to be noticed that to part of this land, the original Arkansas shore, including fractional Sections 22 and 23, the defendant had admittedly a valid legal title, but defendant exercised the same acts of ownership and occupancy over that part of the land between Dustin Pond and “Old River” that it did over that part which it was candidly the true owner.

In the language of *McCaughn v. Young*, 85 Miss., 277:

“This was the same character of control which he exercised over other property which he owned, and was the only manner in which any one could at the time in question have asserted ownership, or exercised dominion over property of the same character similarly located.”

The facts of that case (*McCaughn v. Young*) are strikingly similar to the facts of this case, and under the authority of that case, we submit that to say the very least, the question of whether defendant had actual oc-

cupancy and adverse possession of the land was one of fact for the jury.

If this be true, then the instruction complained of in the sixth assignment of error was clearly erroneous as denying to the defendant the right to a verdict, unless it proved itself the owner of the land, whereas, it was certainly entitled to a verdict if it had the actual occupancy and adverse possession of the land at the time the timber was cut.

Considered as placing the burden of proof upon the defendant, these instructions are erroneous for another reason, and for this same reason, according to the undisputed evidence, the plaintiff had no right to maintain an action of replevin. It is, of course, horn book law that a plaintiff can never maintain an action of replevin against the defendant unless the possession of the defendant is wrongful. Where the defendant's possession is rightful, an action of replevin cannot be maintained.

It has been many times held, for example, that where a plaintiff delivers possession of a certain article to defendant, he cannot later maintain an action to recover it, because the defendant's possession is rightful. (See *Benjamin B. Frizell v. John White*, 27 Miss., 198; *Taplin v. Wilson*, 6 N. Y., sup. Ct. (Thompson & Coats, 502.)

In the last above cited case, the defendant, who was the father of the plaintiff's wife, gave her some furniture, and gave to her other furniture to be used during her life, and if she died childless, to go back to the defendant. The wife died childless. The defendant demanded the furniture, and the plaintiff, after deliberation and legal advice, gave it up. It was held that plaintiff could not recover the property. The court saying: (Quotation therefrom).

In this case, the defendant took possession of the

timber while it was lying where it was cut. No one was in possession of the timber when defendants took it. (Testimony of DeShaw R. p. 61).

It is true that the plaintiffs say that after this time the defendant's agents came into the state of Mississippi, and threatened them with prosecution if they molested the timber. However, plaintiffs, themselves, testified that after this time, they consulted their attorneys and after due deliberation, hired themselves to the defendant for the purpose of perfecting defendant's possession to this very timber.

They worked at this task for about thirty days. We submit that this action on the part of plaintiffs was a ratification of the possession of the defendant, equal to a voluntary surrender of the possession on their part, which disentitles them to maintain an action of replevin. Certainly under this state of facts, it would seem that the jury should not be peremptorily instructed as was done—that burden of proof was upon the defendant to show its title to the timber, but that these instructions should have at least been modified by a proviso, embracing the idea that if the plaintiffs entered the employ of the defendant for the purpose of assisting defendant in perfecting its possession, and with the intent of voluntarily surrendering their claim to the timber, then they would not be entitled to maintain an action of replevin. Certainly, if this was the situation, the burden of proof would be upon the plaintiff, and not upon the defendant.

The instructions as given, however, ignore absolutely this action of plaintiffs, and the jury was unqualifiedly instructed that the burden of proof was upon the defendant.

For these reasons, therefore, we insist that it was materially vitally erroneous for the trial judge to give to

the jury the instructions set out in the sixth and seventh assignments of error; and to refuse that set out in the tenth assignment of error; and that for these reasons, aside from all other questions, the case should be reversed.

FIRST, SECOND AND EIGHTH ASSIGNMENT OF ERROR.

The Court should have directed a verdict in favor of defendant. The undisputed evidence shows that neither plaintiffs, nor their vendors had either actual occupancy, adverse possession, or title to the land where the timber was cut.

Plaintiffs claim that their vendors have title to the land where the timber was cut as an accretion to Lots 1 to 9 inclusive; Section 11, Township 28, Range 5 West, Coahoma County, Mississippi. Defendant insists that the land in question could not be an accretion to this land, because the undisputed evidence shows that it is within the State of Arkansas. This insistence is founded upon the further insistence that this land is North of "Old River" which lies between it and the land of plaintiff's vendors in the State of Mississippi; that "Old River" was the thread, or deep water and navigable channel of the Mississippi River in 1848, and was at that time, and is now the boundary between the States of Arkansas and Mississippi.

Passing first to the authorities with regard to the boundary line between the two states, the State of Mississippi was admitted into the Union of the United States of America by the Act of Congress found in the United States Statutes at Large, Vol. 3, Chapter 23, page 348, approved March 1, 1817, whereby the inhabitants of the then Mississippi Territory were authorized to form for themselves a State Constitution, and to be admitted into the Union, the boundaries of the then-to-be created States

being described as follows: (Quotation therefrom).

On June 23, 1836, by chapter 120 of the Acts of 1836, the State of Arkansas was admitted into the Union, and the description of the boundary thereof was: (Quotation therefrom).

It is insisted that a correct interpretation of these acts, admitting the two states into the Union requires that the line be run along the center of the main channel of the river, and that by "main channel" is meant the channel of navigation—the deep water channel:

Hendley's Lessee v. Anthony, 5 Wheat., 374.

Iowa v. Ill., 147 U. S., 1.

Mo. v. Neb., 196 U. S., 23.

Louisiana v. Mississippi, 202 U. S., 1, 49.

Moore v. McGuire, 203 U. S., 214.

Washington v. Ore., 211 U. S., 127.

Washington v. Ore., 214 U. S., 206.

The tortuous course of the Mississippi River, producing on one side thereof a sloping bank, on which sand bars form, in throwing the main channel or channel of navigation along the other bank, makes it essential, if each State is to have preserved to it an interest in the navigation of the river, that the line be run as insisted by the defendant or as was well said by Mr. Justice Field, in *Iowa v. Illinois*, *supra*: (Quotation therefrom).

Or as Mr. Chief Justice Fuller said in *Louisiana v. Mississippi*, *supra*: (Quotation therefrom).

And in the case from which the above quotation is taken, *Iowa v. Illinois*, *supra*, is approved.

As already stated, in *Iowa v. Illinois*, 147 U. S., 1, it was held that "when a navigable river constitutes the boundary line between two independent states, the line

defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream." It was also held in said case that the terms "middle of the Mississippi River" and "middle of the main channel of the Mississippi River" and "the centre of the main channel of that river" were synonymous.

The rule announced in *Iowa v. Illinois* has been repeated and declared by the Supreme Court of the United States to be the correct rule, and that case has been several times cited with approval.

Keokuk & Hamilton Bridge Company v. Illinois, 175 U. S., 625, 631.

Louisiana v. Mississippi, 202 U. S. 1, 49.

Iowa v. Ill., 202 U. S., 59.

Washington v. Oregon, 211 U. S., 127, 134.

Washington v. Oregon 214 U. S., 205, 215.

And the avulsion of 1848, that is the "cut off" left the boundary line between the two states where it was just preceding the sudden abandonment of the old, and the making of a new channel.

St. Louis v. Rutz, 138 U. S., 226, 245.

Nebraska v. Iowa, 143 U. S., 359.

Mo. v. Neb., 196 U. S., 23.

Mo. v. Kansas, 213 U. S., 78.

That the rule as we have stated it is correct is practically conceded by plaintiffs in the elaborate brief of their counsel filed in this cause on the motion to set aside the continuance, in which brief, on page 104, they say:

"It is true that the Supreme Court of the U. S., has held in question of sovereignty that the

middle is to be fixed at the middle of the principal steam boat channel."

Plaintiff's land, of course, cannot extend beyond the Mississippi state line. We insist that the undisputed evidence shows that "Old River" was the deep water, or navigable channel of the Mississippi River at the time of the "cut off" and is now the boundary line between the states of Arkansas and Mississippi. We have already, in our statement of the case, detailed the evidence on this feature, and referred to the pages of the record. We briefly recapitulate:

The meander line of 1833-35 survey runs through "Old River." This body of water has the typical crescent shape found in bends of the Mississippi River. It is locally known as "Old River." This shows that the general tradition is that it was in fact, the bed of the Mississippi River. A well defined channel leads from either end of it to the present Mississippi River. The timber gradually becomes smaller, growing South and approaching "Old River." There is a high bank on the South and deep water on that side. These things, we insist, show beyond any possibility of contradiction that "Old River" was not only the bed of the Mississippi River at the time of the avulsion, but that it was the last stand of the river—the main channel. These things thus showing this, are reinforced by the fact that it is a matter of common observation in an abandoned channel of this kind that the deepest portion of the channel is the last to fill; and it is a well known fact of which this Court will take judicial notice that in bends of this kind on the Mississippi River, the deep channel is on the concave side of the bend, next to the high bank. The proof in the record also shows this, and shows that in this particular instance, the accretion came down from the Arkansas shore, thus forcing the current against the Mississippi bank. These things are proven beyond dis-

pute, and we submit, necessitate the conclusion that "Old River" is the line between the states and that the lands of plaintiff's vendors cannot extend beyond it; that the timber having been cut North of "Old River" was cut certainly within the confines of the State of Arkansas from the land to which the plaintiff's vendors had no title, and in which they had no interest.

The burden of proof—as heretofore shown—being upon the plaintiffs to show their title to the land from which the timber was cut, and the uncontradicted evidence showing the lack of such title, the defendant was necessarily entitled to a directed verdict.

We further call the court's attention to the fact that the stipulation in the record as to title is that:

"The plaintiffs herein had the right and authority from said owners (that is the owners of Lots 1 to 9 inclusive) to cut the standing timber on said lots **within the calls of said owners' deeds.**"

In other words, the only claim asserted by plaintiffs is their contract with the owners of Lots 1 to 9 inclusive. They had from these owners, simply the right to cut the timber on these lots within the calls of the deeds. This certainly did not give them the right to cut on the accretions to these lots; and thus, the stipulation itself precludes the idea that the plaintiffs had no right to cut timber North of "Old River."

Regardless, therefore, of the defendant's possession or title, we insist that the undisputed evidence showing the defendants had no possession of the land, nor title to it, and the burden of proof being upon them, to show such possession, or title, a verdict should have been directed for the defendant.

**THE UNDISPUTED EVIDENCE SHOWS THAT THE
TRUE TITLE TO THE LAND WHERE THE
TIMBER WAS CUT WAS IN DEFENDANT.**

We have heretofore seen that in as much as the plaintiffs had no actual adverse possession of the land where the timber was cut, they certainly could not maintain an action against the true owner in whom was the real title. This true owner, we submit, was the defendant.

We have already presented to the court our views on the question with regard to the line between the states. It is our insistence that the facts we have detailed show indisputably that the true boundary line between the states of Arkansas and Mississippi is "Old River." We shall not repeat that argument. We only add that in a case of this kind, where a change in the course of the river occurred at a time back to which the memory of man runneth not, and where the mute memorials left by the river are so significant, the Court should be reluctant to disregard the history of this locality so plainly written upon the earth's surface by Him, who made the river and who directed and changed its course in favor of mere conjecture. This character of evidence is not only the best evidence the nature of the case admits of, but the record is plainly made unmistakably, unalterably and imperishably.

"The moving finger writes, and having writ
moves on!"

Assuming then that this land is within the State of Arkansas, we insist that under the facts of this case, as shown by the record, the title is in the defendant.

This contention, we base upon the fact that the record shows that after the cut off was made, the water

gradually receded from defendant's land, and uncovered this land upon which the timber grew. This is "reliction." This land being in Arkansas, the title of the defendant is to be determined by the laws of Arkansas, and under the laws of Arkansas, land uncovered by reliction, that is by the gradual withdrawal of water (whether navigable or unnavigable) from it, belongs to the riparian owners, from whose shore the water withdrew. The rule is thus stated by the Supreme Court of Arkansas in the case of *Warren v. Chambers*, 25 Ark., 120, 4 Am. Rep., 23, 91 A. D., 538. (Quotation therefrom).

It is insisted by the learned adversary counsel that in as much as "Old River" was formed by avulsion (the cut off of 1848) that the doctrine of reliction could not apply and, therefore, that defendant could gain no land by accretion, or reliction of the cut off.

In their brief, upon motion to set aside the continuance, plaintiffs cited in support of this proposition, *State of Tennessee v. Muncie Pulp Company*, 119 Tenn., 47, and *Stockley v. Cissna*, 119 Tenn., 135. These cases are diametrically opposed to the rulings of the Supreme Court of Arkansas. In the first of these cases, the Supreme Court of Tennessee says: (Quotation therefrom).

The first part of this statement is nothing more or less than a denial of the applicability of the doctrine of reliction in regard to navigable streams, and is in direct conflict with the case of *Warren v. Chambers*, *supra*. Another case that arose in Arkansas and was decided by the Circuit Court of Appeals of the eighth circuit is the case of *Harrison v. Fite*, 78 C. C. A., 147-148 Fed., 781, in which it was held that where a lake, which was formed by the New Madrid earthquake, and gradually became unnavigable by reliction, or gradual recision of water that the bed belonged to the riparian owners, so that they could even prevent others from hunting and fishing in what had formerly been the bed of the lake. This Court,

of course, is governed by these Arkansas decisions, and we submit that they are entirely consonant with reason. If it is to be held that the doctrine of reliction has any application, we submit that it is entirely immaterial how the body of water to which it is applied was formed.

What possible difference can it make in applying this doctrine, whether a lake was formed by an earthquake prior to the time when the country was inhabited, or whether it was formed by a cut off of the river at the same time. If it be assumed that a lake more or less permanent in nature was formed, the cause of its formation is immaterial. The real test as to whether the doctrine of avulsion or reliction applies, is whether or not the water immediately receded so precipitately that the eye could follow it in its course, or whether there was a gradual reliction.

In this case, the cut off occurred sixty-eight years ago, and there is still a permanent lake. On the facts, this is sufficient to distinguish the case at bar from *State of Tennessee v. Muncie Pulp Company* and *Stockley v. Cissna*, because in this case, the water was immediately withdrawn from the old river bed. The real test, therefore, is not how the body of water was formed, whether by a cut off or earthquake, but whether or not the water gradually withdrew from the land of the riparian owners.

A significant case is that of *Naylor v. Cox* (Mo.) 21 S. W., 589, the head note which we quote. (Quotation therefrom).

The Supreme Court of Arkansas has passed upon this very question with regard to "Old River" channels. A leading case is *Nix v. Pfeifer*, 83 S. W., 951, 73 Ark., 199. This was a case where the situation was very similar to the case at bar. It involved a cut off of the Arkansas River. (Quotation therefrom).

It clearly appears from this case that the court discussed a case where the body of water was formed by a cut off, as involving the application of the doctrine of reliction.

The true test as above stated is not how the body of water is created, but whether the recission of the water is gradual and imperceptible.

To the same effect is *Barboro v. Boyle*, 178 S. W., 378, (Supreme Court of Arkansas, June 21, 1915) as showing the situation of locus in quo, we excerpt from the opinion: (Quotation therefrom).

The above excerpt shows that this lake was very similar to the one involved in the case at bar, and was formed by a change in the channel of the river and, and yet the court treats as a determining test in regard to the ownership of the land under the lake—not the question of whether the lake was formed by an avulsion, but the question of whether or not it was navigable.

If the doctrine contended for by the plaintiffs be correct, the question of navigability or unnavigability of the lake involved in *Barboro v. Boyle* would have been immaterial, because having once been the bed of a navigable river, which left this bed as the result of an avulsion, the right of the state to the bed became unalterably fixed. As was said long ago by Ulpian: (Quotation therefrom).

We submit that any other doctrine in regard to a stream subject to such vagaries as the Mississippi River would result in the enlargement of the public dominion by infringing upon the rights of the riparian owners. If the river changed its course three times, the state would own three abandoned beds, and also the bed being

used by the river. Such a result should not be looked upon by the courts with favor.

It is, therefore, insisted that the evidence in this case, without dispute, shows a title to the land, from which the timber was cut, in the defendant, because of the fact that the water first receded from defendant's land, and the result of this reliction, under decisions in Arkansas was that this gave to the defendants the title to the land from which the water receded. This being true, the defendant was in all events entitled to a directed verdict, because the plaintiff cut timber from the land, the title to which was in the defendants. Plaintiffs had no adverse possession of the land. Therefore, the constructive possession of the land and timber was in the true owner, the defendant, and no one could maintain replevin against defendant for timber cut from the land.

**EFFECT OF THE DECISION OF THE SUPREME
COURT OF THE UNITED STATES UPON
THE DECISION OF THIS CASE.**

Under two aspects of this case the determination of the boundary line between the State of Arkansas and the State of Mississippi is vital. If defendant is right in its contention that plaintiffs cannot recover unless they show title in themselves to the land from which the timber was cut, then a determination that the land is in Arkansas is fatal to the plaintiff's case. Or, if the defendant is right in its contention that the land being in Arkansas, the title is in it, then a decision that the land is in Arkansas necessarily determines this case in favor of defendant.

For this reason, we again respectfully submit that the better course to pursue would be to allow the decision of this case to await the determination of this boundary by the Supreme Court of the United States in the case of

Arkansas v. Mississippi, which will probably finally be heard by the Supreme Court not later than January 1, 1916. It would certainly be an anomalous situation for this court to hold a certain tract of land to be in Arkansas, or Mississippi, and determine the rights to the parties upon that basis, and then have the Supreme Court of the United States, the only tribunal with jurisdiction authoritatively to fix the boundary between the two states, to hold that the land was in the other state.

CONCLUSION.

In conclusion, we earnestly insist that this case be reversed for the following reasons:

(1). The Court instructed the jury that the plaintiffs were entitled to recover unless the defendant proved to the satisfaction of the jury that it owned the land. Whereas, the true rule is that the plaintiffs not having been in adverse possession of the land when the timber was cut, could only recover the timber, and maintain their action of replevin by themselves assuming the burden of showing ownership of the land.

(2). The court instructed the jury that the defendant could not defeat the action unless it showed itself to be the owner of the land. Whereas, the undoubted rule is that a defendant may defeat an action of replevin for timber severed from the realty by showing adverse possession of the realty in itself at the time of the severance.

It is further insisted that the defendant was entitled to a directed verdict, and that this Court should now dismiss the case for the following reasons:

(1). Because the undisputed evidence shows that neither plaintiffs, nor their vendors had any possession

of, or title to the realty from which the timber was cut, and the burden of proof being upon them to show such possession, or title, they must fail in this action.

(2). Because the undisputed evidence shows that the true title to the land from which the timber was cut was in defendant, and that plaintiffs did not have adverse possession of the land, and, therefore, could not maintain an action of replevin for timber cut from it.

Respectfully submitted,

WILSON & ARMSTRONG,
MONTGOMERY & MONTGOMERY,
Attorneys for Defendant,
Rust Land & Lumber Company.

I, W. P. Armstrong, one of the attorneys for the appellant (defendant), Rust Land & Lumber Company, hereby certify that I have this day mailed, postage prepaid, to Greene & Greene, Jackson, Mississippi, Attorneys for appellees, (plaintiffs) a true copy of the foregoing statement of the case, brief and argument, dated at Memphis this 26th day of September, 1916.

W. P. ARMSTRONG,
Attorney for Appellant,
Rust Land & Lumber Company.

IN THE
SUPREME COURT OF MISSISSIPPI
RUST LAND & LUMBER COMPANY

v.
ED JACKSON ET AL.

BRIEF FOR APPELLEES IN REPLY.

The brief in chief having been dictated before the filing of appellant's brief, we feel in duty bound to reply to certain points therein.

Appellant, as a fundamental proposition, contends "The undisputed evidence shows that the true title to the land, where the timber was cut, was in defendant." We join issue squarely upon this point, and take the last point made as the first to reply to, for if the court accepts our conclusion, the question of the burden of proof is immaterial.

Counsel says: "Assuming then this land is within the State of Arkansas (which we concede only for the sake of argument), we insist that under the facts of this case* * * the title is in defendant. This contention is based upon the fact that the record shows that after the cut-off was made, the water gradually receded from defendant's land and uncovered this land upon which this timber grew. This is reliction." We concede that the law of Arkansas is applicable if the property is within that state. Counsel cites as controlling upon reliction **Warren v. Chambers**, 25 Ark., 120, which case is applicable, not to an avulsion, but to a reliction and accretion. Wherein consider its declaration there made: (Quotation therefrom).

But that case has no bearing whatever upon an avul-

sion, and counsel correctly states our contention that under the avulsion of 1848, the doctrine of accretion and reliction has no application. Counsel concedes that **State v. Pulp Co.**, 119 Tenn. 47, and **Stockley v. Cissna**, 119 Tenn. 135, directly support our contentions, but the contention is made that these decisions are directly contrary to **Warren v. Chambers**. We shall show that **Warren v. Chambers** is confined to accretion and reliction and does not deal with avulsion.

Counsel cites **Harrison v. Fite**, 148 Fed. 781, which is a decision by a Federal court and is valueless because it merely announces the Federal court decisions as to the state law following implicitly the ruling the Supreme Court.

Archer v. Greenville, 233 U. S. 68.

There is a fundamental difference between the doctrine of reliction and accretion and the doctrine applicable to avulsion. These fundamental distinctions are established in the State of Arkansas. Counsel here relies upon **Naylor v. Cox**, 21 S. W. (Mo.) 589, which he quotes, but which held merely this so far as applicable: (Quotation therefrom).

Turn to **State v. Keene**, 84 Mo. App. 130, which was an avulsion case and note the decision. (Quotation therefrom).

It will be noted that this (**Naylor v. Cox**) was not an avulsion but a reliction and accretion and the doctrine of the two are absolutely dissimilar.

Counsel then cites as conclusive the decision of **Nix v. Pfeifer**, 83 S. W. 951. Counsel's quotation therefrom is as follows: (Quotation therefrom).

It will be perceived that therein there is an omission

from the decision as made, which omission is indicated by stars. But those stars represent the gist of our contention, and that decision is controlling in our favor with the insertion of the full quotation. (Quotation therefrom).

So, it will thus be seen that that decision expressly excepted avulsions from its declaration and leaves the law of Arkansas upon that point in accordance with our contention as set out in our main brief. Note furthermore, in the syllabus of said decision it is said: (Quotation therefrom).

And this saying accurately delineates the holding of the Court.

Turn to **Cessil v. State**, 40 Ark. 504, where the Court said: (Quotation therefrom).

This case is approved in **Deloney v. Arkansas**, 88 Ark., 313, and **Wolf v. State**, 104 Ark. 43.

It will be perceived therefore that the Supreme Court of Tennessee, which quoted the foregoing from the Supreme Court of Arkansas, was following the Arkansas decision, and not, as counsel contend, overturning it.

Counsel, we feel sure, was inadvertent in the omission, but such omission changes that decision from one in his favor to one in our favor.

Again reliance is placed upon **Barboro v. Boyle**, 178 S. W., 378, with which we have no complaint to make. It is entirely in accord with our contention; its syllabus declares: (Quotation therefrom).

And in the body of its opinion, our contention is accurately set forth thus: (Quotation therefrom).

Later, in **Johnson v. Quarles**, 182 S. W. (Ark.) 288, it was held that the bottom of the Mississippi river belongs to the State. See, also, **Southern Sand etc. Co. v. State**, 180 S. W. 219.

Counsel seems to think that the change in the bed of the Mississippi river would unduly enlarge the public rights. This very argument is met and answered in the cases from Tennessee, and counsel's statement that the State would own three abandoned beds (see page 34) is answered by the fact that under the settled law avulsion does not divest title, and instead of owning three beds, the title to the underlying soil would be vested in the State as to one channel alone. The right of public passage would belong, of course, but the ownership of the soil would not cease.

The fundamental trouble with counsel's argument is, that he fails to grasp the reason of the law. Where there is a stream, and that stream gradually, either by accretion or reliction, changes its boundary, the said boundary remains the same, because he who stands a chance to gain by accretion, also stands a chance to lose by the same agency, but where the agency that brings about the change has ceased to exist, then the reason of the law has ceased to exist, and the reason having ceased, the law ceases as well. See **Nebraska v. Iowa**, 143 U. S. 361, 36 L. Ed. 188, wherein the reason of the rule is thus accurately stated in the opinion of the Attorney General of the United States, there quoted. (Quotation therefrom).

See **Gould on Waters**, Sec. 159, 1 **Angell, Water Courses**, Sec. 60; **Missouri v. Nebraska**, 196 U. S. 33, where in the words of Mr. Webster, the reason of the doctrine is thus stated from **New Orleans v. United States**, 10 Pet. (U. S.) 662. (Quotation therefrom).

And again, in the words of that tribunal: (Quotation therefrom).

Our examination of this question has been very thorough, as much so as it was possible to make it, and we have not found a single decision in America that attempts to apply the doctrine of accretion in a case of avulsion in the case at bar. The reason ceasing, the law itself ceases. There is no justice in taking one man's land and giving it to another for the purpose of preserving a boundary which has ceased to exist. Our court in **Nix v. Dickerson**, 81 Miss., 632, refused to follow that line of cases which took away the property of one party and gave it to another, and held: (Quotation therefrom).

Accretion preserves the boundaries at the expense of the abutting owner upon the hypothesis that by allowing the river to remain the boundary, each party is benefited, but where the river ceases to be the boundary, then there is no reason for the application of the rule. The theory of accretion demands that there should be an agency which can both give and take away, and that in order to conserve the public convenience, the boundary must remain the same, as the parties have an equal chance to have their property remain or to have their property taken away. This potential giving and taking away is that, upon which is predicated the doctrine of accretion when there is added thereto the convenience of having a public stream as a boundary. But take away the public stream; have its bed abandoned, and that which at one time caused the operation of this rule of law ceases to have any applicability as demonstrated by the decisions in the Supreme Court of Tennessee, to which we have heretofore made reference. Counsel has, therefore, upon this head, cited cases from only two states. From each of these states, we have shown that the rule is contrary to the contention made by counsel,

and we submit, with the utmost confidence, the unanswerable argument made by the Supreme Court of Tennessee.

There was no denial of the doctrine of accretion by the Supreme Court of Tennessee in the Pulp Company and Cissna cases. That doctrine was recognized in its fullest extent, but the doctrine relative to avulsion was shown there to contain the controlling principle. See **State v. Keane**, 84 Mo. App. 130; **Marks v. Sambrano**, 170 N. W. 549; **In Re City of Buffalo**, 99 N. E. 852; **Railroad v. Coulthard**, 96 Neb. 610; **State v. Brown**, 135 N. W. 494; **Rover v. Michelson**, 82 Neb. 49.

Therefore, with the utmost confidence, we submit that appellant has no title to the land that was originally covered by the Mississippi river, but that the title thereto is in the State of Arkansas, and counsel in his able brief has made no reference to the fact that they were only paying taxes upon 70 acres of land, upon a basis of \$275.00, and that said 70 acres were almost a mile from the land upon which the timber is cut.

2. Counsel's next assignment to which we direct attention is: "The court should have directed a verdict in favor of defendant. The undisputed evidence shows that neither plaintiffs, nor their vendors, had either actual occupancy, adverse possession, or title to the land where the timber was cut." In answer, we deny (1) that the land was in the State of Arkansas, but aver that it was within the State of Mississippi. Counsel predicates this assertion upon this declaration: "This insistence is founded upon the further insistence, that this land is north of Old River which lies between it and the land of plaintiffs' vendors in the State of Mississippi; that Old River was the thread of deep water and the navigable channel of the Mississippi river in 1848, and was at that time, and is now, the boundary between the States of Arkansas and Mississippi." (a) Appellees' witnesses,

before the jury, testified that Old River, which is called Pecan Lake, the term "Old River" having never been heard by some of the plaintiffs' witnesses, was formed by an overflow in 1857, when the levee broke. This testimony is uncontradicted by any witness and was accepted by the jury. And under counsel's opening concession that he accepted all of the findings of the jury as conclusive, we submit this finding cannot be assailed. (b) This record shows that the Mississippi river, in 1848, was substantially of the same width that it is today, approximately three-quarters of a mile wide, or perhaps a little wider. There is in this record no proof from beginning to end as to where the navigable channel of the Mississippi river was located in 1848. That being true, we submit two propositions: (1) The boundary was midway between the fixed bank in Mississippi and the fixed bank in Arkansas; (2) Assuming this not true, and that the navigable channel governs, then that there being no proof, thereof the presumption is that said boundary was equidistant between Arkansas and Mississippi. It appears that the Mississippi bank is a high bluff bank at the present time, and extend a line northward therefrom three-quarters of a mile, and appellant will not have a shadow of title to the land from which this timber was cut. Appellant contends that the boundary between Arkansas and Mississippi is the thread of what is now Pecan Lake, but primarily there is no proof upon which to predicate any such assumption, that this Pecan Lake was the **navigable channel** of the Mississippi river. As to where such boundary is located, the Supreme Court of Arkansas has rendered an express decision which counsel has overlooked. Note **Cessill v. State**, 40 Ark., 501, where the rule of law is thus declared. (Quotation therefrom).

In concluding that opinion, the Court said: (Quotation therefrom).

The main channel, therefore, as determined by the

Supreme Court of Arkansas and the Supreme Court of Mississippi is a point equidistant between the fixed banks. This was the decision in the Tennessee case in virtue of the decision upon the precise point of the Arkansas court. Upon these decisions thus defining boundaries, the Supreme Court of the United States, under the authorities cited in our original brief, is bound to follow the local law, and is not at liberty to bring into the question that which the states have decided for themselves. The main channel of the Mississippi river is not where Pecan Lake is located, but lies equidistant between the Arkansas shore as fixed then and the Mississippi shore as then fixed.

The decisions from the Supreme Court of the United States do not in any way concern us, because Arkansas and Mississippi have fixed between themselves this boundary, and that boundary is as heretofore declared.

We respectfully submit that the record in this case wholly fails to show what was the navigable channel in 1848. There is not a witness who testifies upon that point, and the witnesses who did testify show that this lake was washed out in 1857, when the levee broke. We deny that this body of water is known as "Old River." Generally, of course, the very partisan witnesses who appeared for appellant, did so testify, but their testimony is discredited. We deny that the record shows that the well defined channel leads from either end of it to the Mississippi river, and submit that the evidence for the appellant makes no such showing. We deny that the record shows that the timber gradually becomes smaller as one approaches old river.

Would it be tolerable for the State of Mississippi to have to accept, say where the river is three-quarters of a mile wide, one-half of a body of water which is, say three hundred yards wide, as its portion, when the other state

has held that its jurisdiction extends no further than the middle of the channel? Where would the jurisdiction of the State of Mississippi end, and who would have jurisdiction over that portion of the river which is held by the Supreme Court of Arkansas not to belong to Arkansas, and which lies between that line and the line to which appellant contends the State of Mississippi's boundary extends? That fact would lead to endless litigation which would be highly profitless because a man can always be trusted to claim that which belongs to him rightly, and not claiming under the decision of the Arkansas court beyond the thread of the main channel of the stream, we have a condition in which both states upon the banks of the Mississippi have, by a uniform course of decision, established that the center of the fixed channel was their division line. See the authorities collated in the main brief.

2. There is no proof where the steamboat channel was at the date of the transaction in question. There is absolutely not a line in this record, from one end of it to the other, with reference to that fact, and it therefore is a question which rests upon presumption, and the presumption in that behalf existing is stated in **State v. Keane**, 85 Mo. App. 130, thus: (Quotation therefrom).

See **Dunleith v. County**, 55 Iowa, 558, and cases collected in our principal brief upon this point, collected from the Tennessee case and there referred to.

3. As said in **Iowa v. Illinois**, 147 U. S. 9, quoting from Halleck in his *Treatise on International law*: (Quotation therefrom).

Woolsey in his "International Law" repeats the same doctrine and says: (Quotation therefrom).

It does not appear in the instant case that the bed

of Pecan Lake was the more suited for navigation. On the contrary, this court judicially knows that in rounding a bend in the river, the steamboats do not take the long course around the bend, but follow that channel as close as possible to the farther shore. In other words, they take the shortest cut possible, and taking the shortest cut possible, the navigable channel used by the steamboats would not lie under the cover of the Mississippi bank but would be on the contrary as near the Arkansas shore as it may be possible to go with safety. That channel would be adopted both by the boats ascending and descending the river, because if they followed the farther shore this would entail their going many miles farther than would be the case if they took the short cuts and followed the navigable channels near the opposite bank. These facts are so patent as to make a contention to the contrary without foundation.

4. As further held in the same case in the Supreme Court of the United States, where the states have by custom established the boundary at the middle of the stream equidistant between its banks, that court there says expressly that such custom of such fixation is conclusive. We have shown such fixation by the State of Arkansas, and necessarily by the State of Mississippi, and therefore, we reach the conclusion that a line drawn equidistant from the fixed shore in Arkansas and the fixed shore in Mississippi, would be the dividing line between appellees and the State of Arkansas. The high-water mark on the Arkansas shore is the boundary line of the appellant. The deepest channel is not of necessity the boundary line. The interest of the State is not in the depth of the water but **in the navigation of the stream.** **Navigation and depth** are in no wise synonymous, and in order to afford the most effectual protection to the adjoining states in the enjoyment of the river, the rights with reference to navigation would have to determine the boundary line. It would be intolerable to compel

one state to follow the deep channel when by so following said channel, the boats of the adjoining state could take advantage of a perfectly safe channel which would be shorter and more expeditious. Navigation, and successful navigation is the criterion, and where the navigable channel was is a question which we are not prepared to answer further than to say, it certainly did not in any way coincide with the dividing line of the middle of Pecan Lake. Counsel says "The plaintiffs herein had the right and authority from the owners (that is, the owners of Lots 1 to 9, inclusive) to cut the standing timber on said lots within the calls of said owners' deeds." Counsel contends that this did not cover the right to cut the timber on accretions to the lots. The parties to the contract, conceding, for such must be the case, that the owners of lots 1 to 9 have allowed the cutting to be done under the contract in question, we do not see where the appellant is in any position to raise the question. It was not any concern of the appellant what these parties agreed upon, so long as it did not invade its rights, but the contention that the deed to the lots did not carry title to cut is preposterous. It is shown that the timber was paid for on the basis of \$3.50 per thousand, and that the timber that was cut was the timber that was intended to be cut. Of this, there can be no question. Counsel plants himself upon the proposition that the right to cut on the lots did not carry the right to cut on accretions to the lots, so as to protect the right as against trespassers. That this is absolutely without foundation is demonstrated by all of the authorities. Does a deed to a lot embrace the accretions? In the court below this question was not raised, but even so, appellant cannot take advantage because appellees' ownership extended to the thread of the stream, and the lots embraced this riparian right as part of the land within their calls. The fundamental error which appellant makes is that under the law of Mississippi, riparian rights project the title to the thread of the stream,

and we claim not so much by accretion as under an absolute chain of title as those who own the shore of lots 1 and 2. When the avulsion occurred, title became perfect, and the question of reliction and accretion ceased to operate. Our property which had been subject to the right of public passage while the water ran over it became discharged and the deed to appellant must be construed in accordance with the local law.

Archer v. Greenville, 233 U. S. 68, L. Ed. 853, where the court said: "This court has decided that it is a question of local law whether the title to the beds of navigable rivers of the United States is in the state in which the rivers are situated or in the owners of the land bordering upon such rivers." Citing and collecting numerous cases.

Note the instructions which the appellant received, which were far more liberal than it was entitled to, and note, please, what the jury thought of the testimony which it discredited.

5. Counsel's final proposition is that the court erred in giving this instruction: "The court instructs the jury that should they find from the evidence that the plaintiff cut the timber in controversy in good faith by authority of King and Anderson, Charles McGhee and Ellen Jackson, who **bona fide** claimed the lands as accretions to Section 11, Township 28, R. 5 West, in Coahoma County, Mississippi and the defendant by force or intimidation took the timber away from them, then the plaintiffs have made out a **prima facie** case, and it devolves upon defendant to show by a preponderance of the evidence that it is the owner of the land from which the timber was cut before defendant can recover in this case." If counsel was so certain of the latter proposition, namely, that he was the owner, there would be no necessity of making this question of the burden of the

proof the principal assignment of error, devoting thereto more than half of his argument. Note the instructions for appellant. Counsel says it to be axiomatic that "the burden of proof is on the plaintiff to show his title and right to possession." But this court has expressly held in *Coleman v. Lowe*, 13 So. (Miss.) 227, that "An instruction that the right to possession and to title must both be the plaintiff to enable him to recover is error as the right to possession is sufficient to maintain the action."

We have no fault to find with *Austin v. Terry*, 88 Pac. 189, nor *Bronson v. Carriage Co.*, 93 Miss. 793. Counsel claims that there was no right to bring replevin. Yet he took issue and tried the rights of the parties therein, and now having lost, is he at liberty thus to experiment with the courts? But *Gastrell v. Phillips*, 61 Miss. 413, demonstrates the right of appellees here to sue. There was an actual possession of a large portion of Section 11; in fact all of that portion which lay outside of the levee; whereas that portion inside of the levee was subject to overflow and incapable thereby of actual occupancy. See *McCaughn v. Young*, 85 Miss. 277.

Turn to the record, page 9:

"Q. Who has been in actual possession of that land during all of that time claiming it as theirs?

A. Same parties claiming it now.

Q. That you bought the timber from?

A. Yes sir.

Q. Did you ever know it to be disputed by anybody at all?

Defendant objects.

Q. What, if any, dispute about it, did you ever hear?

A. No, sir. None at all.

Q. Who claimed to own that land to you there at that time, adversely to the world?

A. King & Anderson, Ellen Jackson and Joe Williams."

It appears that appellees had been at work cutting this timber and getting it in shape for three weeks prior to the time of the taking of said timber from them by force, and that they had purchased it, paying therefor \$3.50 per thousand, and that at that time, they were well known to be the parties claiming said title, and thereupon the "high sheriff" of Phillips County, Arkansas, came with a representative of appellant, invaded Mississippi territory and with a warrant, and their actions are thus described:

"A. He come and brought warrants from Phillips County, Ark., and when he come, he told us that if we give the timber up, or else come on with them; of course when he come and brought the high sheriff, rather than go with them, they taken it way from us."

The appellees at once consulted counsel who told them to have the raft made and bring it within the unquestioned jurisdiction of Mississippi, and that by working for appellant who had by violence taken their property they lost none of their rights, is, we submit, too plain for argument. No man can found a right upon his own wrong.

Note again (R. 11):

"Q. In what way did they take it from you, by force or not?

A. By force, we wasn't willing to give it up; came there with the High Sheriff from Phillips County; we were satisfied we were right, but when the High Sheriff come, couldn't help it, said it would be in compelled to

give it up when the High Sheriff come, and he come and took it away from us.”

Again (R. 22) it appears that the owners were in possession of this land, claiming it as theirs, and had repeatedly sold timber therefrom.

The acts of the sheriff are thus designated again (R. 26):

“A. Well they just said they must have it, had to have it.

Q. Well, what did they say, if you didn't let them have it?

A. Said if we didn't let them have it, why, of course, they were going to put us in jail.

Q. Did you turn it over to them willingly?

A. No sir. I didn't turn it over to them willingly.

Q. What did you do immediately when they took charge of the timber?

A. When they took charge of the timber, of course, he explained to me that this was the sheriff of Phillips County, Arkansas, but me being a negro man, I just give down, had to give down.”

Counsel is in error in stating that there was no adverse possession by appellees' vendors. There was not only possession, but possession under color of right, and possession taken under a survey made with the lines marked out, not once, but several times. Appellees' vendors were in possession directly south of the levee, and if they were the owners of the land, their constructive possession was just as valid as the alleged constructive possession of the appellant, which could have, however, in no case, extended below the **highwater mark** on the Arkansas side, because it is fundamental that neither the United States nor the State can be **disseized**. There is no constructive possession as against a sovereign, and

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this is the position as to the Arkansas side of the river. We claim that we have shown beyond the peradventure of a doubt an actual title, but here we enter under those in actual possession of Section 11, who pointed out the timber to be cut, which timber was within the lines run by the surveyor who laid out the land. The prior possession is shown, and irrespective of title, was sufficient to defeat the fictitious claim of the appellant. The doctrine of Shinn on Replevin can have no application in the face of *Gastrell v. Phillips*, 61 Miss., 413, where the land was of this very character, and appellant is not only not shown to hold this land adversely, but on the contrary, the possession thereof is with the appellees. Counsel need go no further than *Gastrell v. Phillips* for the law on this point, and it appears to us to be absolutely conclusive of the point because the court there said that they were disposed to restrict the doctrine "within its narrowest limits and to deny the action as against the actual possessor of the land," and surely there is no pretense that either the appellee or appellant had other than constructive possession. Our court has confined the rule to refuse replevin only where there is "an actual adverse occupation of the land held in good faith under claim of title." We direct attention to the use of "actual occupation" not adverse possession, but actual adverse occupation held in good faith under claim of title, and appellant certainly does not occupy that category because (1) there was no actual occupancy; (2) There was no good faith upon its part, because it paid taxes upon only 70 acres assessed at \$275.00 and (3) there seems to be no claim of title further than to said Sections 22 and 23, which are remotely located. The appellant had not such occupancy as our court has required.

Counsel cites several decisions which do not in any way touch our contention. He cites, first, *Hart v. Vinzant*, 6 Heisk., (53 Tenn. 616) which merely held. (Quotation therefrom).

We endorse unqualifiedly **Lieberman v. Clark**, 114 Tenn. 126, which counsel quotes in part, but omits to quote these very pertinent declarations. (Quotation therefrom).

Cobbey on Replevin is not accessible, but Wells has nothing in it which is in any way in conflict. There had been here an actual possession taken of the land held in good faith, and the defendant's own witnesses admit the taking of the possession. It was a question for the jury to say whether this possession was taken by the defendant from the plaintiffs by force and intimidation. If it was, the instruction presented a rule that is demonstrably correct even under appellant's cases. But in order to condemn this instruction appellant must prove that there is no evidence upon which to base it. The correctness of the instruction where there has been an actual taking of possession, if such is the case, by force and arms, or duress, is admitted even in appellant's own cases. Could there be an action of ejectment for land which was certainly not in possession of appellant? And the reason for the rule ceasing, the rule must cease as well.

The case of **North Shore etc. Co. v. Nicomen**, 101 Pac. 48, merely held. (Quotation therefrom).

The case of **Redford v. Hungerford**, 29 Wis., in no way conflicts with the rules which are announced in the cases upon which we rely.

The rule in Tennessee is given in our favor unequivocally in **Lieberman v. Clark**, 114 Tenn. 126. Surely a possession obtained by trespass cannot be made the basis of an action of replevin, but that does not touch the instant case.

The note in 89 American Decisions cites with ap-

proval the case of **Gastrell v. Phillips**, 61 Miss. 413, which, of course, is conclusive here.

Counsel enunciates here four propositions: (1) "The burden of proof is upon plaintiff in an action of replevin to show his right of possession." Conceded. We have shown prior possession unlawfully and forcibly terminated and actual ownership in our vendors who pointed out the property and continued in actual possession. (2) "In an action of replevin for articles severed from the realty that person is entitled to prevail who has actual adverse possession of the realty, which carries with it the possession of the articles severed." This we answer by denying that appellant had any possession and by averring that appellees were in possession, and further, by stating that he who by force takes from an-

other, cannot question that other's right of possession, except he prove a paramount title in himself. Appellees had just as much constructive possession as appellant, who could not have constructive possession of the **locus in quo** by reason of the ownership by the State of Arkansas. The other two propositions, we submit, are fully answered by the foregoing.

Counsel states "It is not contended by any one that any of these lots extended to the north of Old River where the timber was cut." In this counsel is in serious error. Counsel's own map shows a part of Lot 1 to be north and east of Pecan Lake, and the line as claimed and run by these surveyors included the entire land from which timber was cut. Counsel is in error in stating that there was never any adverse possession of the land by the appellees. It appears that the lines were run, that the timber was sold from time to time, and cut when and as needed, and that the right so to do was claimed by the parties continuously. **McCaughn v. Young**, 85 Miss., 277, demonstrates that this is adverse possession. It will

be perceived that appellants did not go to the timber where it had been felled and take possession of it **there**, but while appellees were sojourning at their homes on the Mississippi side of the levee, unquestionably, came with the sheriff of Phillips county, and according to appellant's own testimony, seized the possession from these parties and made them give up their rights or else accompany said sheriff from their homes in Mississippi, on Mississippi soil, into a foreign state under warrants issued by some official who had the temerity to do the bidding of this corporation. Logs are not capable of actual but only constructive possession while in the woods. The case is not one where the timber was taken or cut by the appellant, but where the appellees who had worked, were brought face to face with the appellant who took from them the timber and made them give up their rights or else go to jail.

It appears that the highwater was rising and that unless this timber was immediately cut it would have been valueless to all persons.

Counsel says "It fully appears from the record that the presence of the sheriff with the agent of defendant was intended as a warning against future trespasses. "And, yet, the witnesses say that it was either deliver possession of this timber or go to jail. Appellant shows that the date of the conversation between the sheriff and the appellees was January 21, (R. 66) and "The conversation between you and the deputy sheriff and these plaintiffs was on what date? (R. 66). A. It was on the 21st of January." Turn to the evidence (R. 2) which shows the affidavit to have been sworn to upon the 22nd day of January; the writ issued **January 22**, but was not executed until February 8th. (R. 3-4). So that when appellant tells the court that these negroes willingly surrendered the timber, he is manifestly and palpably telling what is not so, and yet, according to his own ad-

mission at page 64, we have this: "Q. What threat did you make against them, if any, if they did not release it? A. Well, the deputy sheriff told them if they ever went across there or did not release this timber they were going to take hold of them **and take care of them.**" With this declaration that they were going to be taken care of, is it wonderful that these ignorant negroes "willingly" gave up the timber? At page 65 of the record, this witness is a little more explicit as to what was meant by "taken care of," namely, "They were going to be put in jail" for buying timber at \$3.50 per thousand, expending their labor upon it, and then trying to sell it, and yet for that they were to be put in jail in a foreign state. The witness says: "He was taking charge of the timber" and "The negroes were satisfied." "Q. What did they say? A. **They gave up the timber at that time in my possession.**"..Of course, cumbrous articles cannot be handed from hand to hand, but in the words of this most antagonistic witness who said that the negroes were satisfied, he tells the court that he got **possession** from the negroes, and we say that if his statement that he got this **possession** from the negroes is true, then that possession so thus gotten was taken away from them by force and intimidation and under duress, so that they could rely upon their prior possession as adequate protection for the reasons set forth in the Lieberman case. Let him return the possession and sue in replevin.

Counsel is in error when he claims that the title to the land from which the timber was cut was not and is not claimed by appellees' vendors. That such claim was made is evidenced by the motion to set aside the continuance herein made.

The law contained in the instructions complained of at page 18 is clearly correct where the prior possession of the plaintiffs is shown and such possession is wrongfully terminated. Authorities supra.

Counsel says: "We take it that it will not be insisted by learned adversary counsel that there is any evidence in the record that actual adverse possession of the land was in plaintiff's vendors, because there is absolutely nothing in the record to sustain such an insistence." But we respectfully submit that counsel is in grave error in both statements, because we show by the witnesses that they have for years been in actual possession of the land outside of the levee and had the same in cultivation, and that they have sold timber from the lands here in controversy, and that no one has disputed their right to possession; that they have had their lines run and bought with reference to these lines.

Counsel complain under the sixth assignment of error that it was erroneous to require that appellant prove his ownership, but we submit that where force is applied, that is the only means whereby appellant can succeed. Authorities in original brief.

We deny that there is any evidence in the record that the plum orchard is now or has been for years in cultivation. The other field, said to be partly on accretions, is within the boundary of the State of Arkansas, and does not come within our claims, and is separated by Dustin Pond from the land in question. Whether or not this land was in the possession of a caretaker is a point in issue, and the cutting of the timber that was down is a point in issue upon which the evidence was in conflict, and the jury disbelieved appellant upon the point.

Appellant claims that they treated any one who cut timber as a trespasser, and yet the appellees show continuous cutting, going back many years, whenever they desired to cut it, and no action instituted on account of such cutting.

Where a party takes from the possession of another

property by force, the only defense which such party can assert in answer to an action of replevin is ownership, and this is so held under all of the cases.

Counsel rely upon **Frizelle v. White**, 27 Miss., 198, which does not touch this question, and **Taplin v. Wilson**, 4 Hun. (N. Y.) 248, which is quoted from, contains nothing to which we do not subscribe.

The further quotation from the same case shows:

“This is not a question of estoppel. It is rather the same doctrine by which a party who has voluntarily settled with another a disputed claim shall not be allowed to open that settlement on the ground that he might have done better for himself. ‘Compromises are to be encouraged, because they promote peace, and when there is no fraud, and the parties meet on equal terms and adjust their differences, the Court will not overlook the compromise.’”

Counsel say in this case “The defendant took possession of the timber while it was lying where it was cut. No one was in possession of the timber when defendant took it.” He quotes as sole authority *Deshay*, who is a discredited witness, and *Deshay* testifies expressly that he got possession of it from the negroes under the conversation held in Mississippi under the threats given by the sheriff “of taking care of these negroes.”

Counsel is in error about stating that the negroes worked on this timber thirty days. The conversation as shown occurred January 21st. The affidavit in replevin was made January 22nd, and was levied as soon as it was feasible upon February 8th. But the writ of replevin issued upon January 22, under which the sheriff was commanded upon that date to make his levy, and the

fact that he did not levy until the 8th of February cannot prejudice plaintiffs' rights. We did not want this defendant to run these logs off into Arkansas, and the very day after this outrageous conduct, the appellees brought their suit in the courts, and surely there cannot be a ratification by the failure of the sheriff to levy the writ of replevin when it was placed in his hands, and by him retained from January 22nd until February 8th. The burden of proof does not cut much figure in this case because the rights of the appellees are demonstrable as hereinbefore set forth.

6. In answer to the statement of the case made by appellant, we are going to appeal to the record, because in our conception of the record, there has been an entire misconception of the case upon the part of appellant who seems to have conceived that he was retrying in this Court that which has been decided against him in the court below. This case is one which presents an outrageous wrong, and one which it is the duty of this Court to have remedied.

Appellees showed that Pecan Lake was washed out in 1857 and showed how it was washed out, and there is not in the record anything to contradict this showing. We therefore confidently submit that upon this point, also, the judgment should be affirmed as to continuing the case until the U. S. Court decides the line between Mississippi and Arkansas. We have written this out fully in the brief in the motion to which we refer should it again come in question.

GREEN & GREEN,
Attorneys for Appellees.

We hereby certify that we have delivered a copy of the foregoing answer to appellants brief, to counsel for appellant, before filing.

Jackson, Miss., Oct. 16, 1916.

GREEN & GREEN,
Attorneys for Appellees.

**RUST LAND & LUMBER COMPANY v. JACKSON
ET AL.**

**ERROR TO THE SUPREME COURT OF THE STATE OF
MISSISSIPPI.**

No. 171. Argued March 4, 1919.—Decided May 19, 1919.

The contention that an issue between private parties involving the location of the state boundary was submitted to the jury upon a theory inconsistent with the true principle of decision as laid down by this court, and that thereby a party was deprived of a right, privilege or immunity claimed under the Constitution and treaties of the United States, will not afford ground for a writ of error to review the judgment of a state court under Jud. Code, § 237, as amended. P. 73.

The claim that the decision of an original suit between two States pending in this court for the determination of their common boundary will be determinative of private rights to timber, involved in a case between private parties pending in the Supreme Court of one of such States, and that a party to the latter case will be entitled to set up such decision when rendered and is entitled to a continuance meanwhile, *held*, at most, an assertion of a title, right, privilege or immunity under the Federal Constitution; and the refusal of such continuance by the state court *held* to involve no question as to the jurisdiction of this court to render a conclusive judg-

ment in the suit between the States, locating their boundary, and hence no question as to the validity of "an authority exercised under the United States" within the meaning of Jud. Code, § 237, as amended. P. 74.

An application for certiorari to review a judgment of a state court cannot be entertained after the three months' period limited by § 6 of the Act of September 6, 1916, has expired. P. 76.

Writ of error dismissed. Certiorari denied.

THE case is stated in the opinion.

Mr. Albert M. Kales and *Mr. Herbert Pope* for plaintiff in error.

Mr. Garner W. Green, with whom *Mr. Gerald Fitzgerald*, *Mr. George F. Maynard* and *Mr. Marcellus Green* were on the briefs, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case was brought on for argument immediately following *Arkansas v. Mississippi*, No. 7, Original, this day disposed of, *ante*, 39.

It was a replevin suit, brought in the circuit court of one of the counties of Mississippi by defendants in error to recover certain timber taken by plaintiff in error from their possession under a claim of ownership. They recovered a verdict and judgment in the circuit court, and the judgment was affirmed by the Supreme Court of the State, without opinion. Ownership of the timber was deemed to depend upon the ownership of the land from which it had been cut; and this was in dispute, and according to the theory of plaintiff in error was dependent upon the location of the state boundary. The land lay in the Mississippi River bottom, in the vicinity of Horseshoe Bend, where a portion of the former channel had been abandoned as the result of a sudden change that occurred in the year

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1848; the river having broken through the neck of the Bend and formed a new channel there, with the result that in the course of time the former channel around the Bend was abandoned and in large part filled up, and its location as it was prior to the avulsion has become, after the lapse of so many years, difficult of ascertainment. The adjoining States whose common boundary is marked by the River at this point are in dispute as to its former location, and also as to whether the boundary ought to follow the middle of the former main channel of navigation or rather a line equidistant from the banks of the River at ordinary stage of water. To determine this controversy, the suit between the States was brought in this court, and it is still pending.

It is the contention of plaintiff in error that the judgment in the present case was based upon the determination of an issue which necessarily involved the location of the interstate boundary; and our first inquiry must be whether the judgment of the Supreme Court of Mississippi herein is reviewable in this court by writ of error. The judgment was rendered December 23, 1916, after the taking effect of the Act of September 6, 1916, c. 448, 39 Stat. 726, amendatory of § 237, Judicial Code, and hence is reviewable here, if at all, only by virtue of that act and in accordance with its provisions.

It is asserted that the issue involving the location of the boundary line between the States was submitted to the jury under instructions from the trial judge based upon a theory inconsistent with the true principle of decision as laid down by this court in *Iowa v. Illinois*, 147 U. S. 1; *Arkansas v. Tennessee*, 246 U. S. 158, and *Cissna v. Tennessee*, 246 U. S. 289, and that thereby plaintiff in error was deprived of a right, privilege, or immunity claimed under the Constitution of the United States and treaties made thereunder. Even if the record showed that such a right, privilege, or immunity was properly set up

and claimed in the state court, it of course is not maintained, nor could it be, that under § 237, Judicial Code, as amended, a federal question of this character would give us jurisdiction to review the resulting judgment by writ of error. Were that the only federal question, clearly it would at most furnish ground for a review by certiorari.

But it is insisted that the Supreme Court of the State, in the course of its review of the judgment of the circuit court, rendered an adverse decision upon the question of the validity of an authority exercised under the United States, and for this reason we have jurisdiction by writ of error under the amended § 237.

The question arose as follows: Plaintiff in error moved the Supreme Court to continue the cause until the decision by this court of the original action then and still pending between the States of Arkansas and Mississippi, in which the location of the disputed boundary at or near the land in question is involved. This motion at first was sustained; but afterwards the defendants in error moved to set aside the continuance upon these grounds: (1) That the decision of this court in the suit between the States would not be controlling in the present case because it would not be rendered upon the same testimony; (2) That the Supreme Court of Mississippi was an appellate tribunal without original jurisdiction, empowered only to affirm or reverse a decision of the circuit court, depending upon whether that court upon the evidence before it had reached a correct conclusion, and that there was no way in which the judgment of this court in the suit between the States could be introduced before the Supreme Court of Mississippi; and (3) Because the latter court was not in any way subject to the final jurisdiction of this court. This motion was sustained, the continuance was set aside, and the cause was placed upon the docket and afterwards disposed of in its regular order; with the result, as is maintained, that final judgment was rendered upon an

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erroneous theory respecting the location of the interstate boundary line.

It is the contention of plaintiff in error that by the last-mentioned motion the validity of the authority of this court to determine the issues involved in the suit between the States was drawn in question, and that the decision of the Supreme Court of Mississippi was against its validity.

We do not, however, regard the ruling of the state court as having involved the authority or jurisdiction of this court to render a conclusive decision in the suit between the States respecting the location of the boundary line; and hence do not consider that there was any question concerning the validity of "an authority exercised under the United States" within the meaning of § 237. The question raised involved merely the consequences that were to flow from the exercise of an admittedly valid authority under the United States, that is to say, the effect upon the rights of third parties of a particular exercise by this court of its constitutional jurisdiction over a controversy between two States; the concrete questions being (a) whether, in the event that our decision should be adverse to the State of Mississippi—and therefore, according to the theory of plaintiff in error, inconsistent with the title of its opponents—plaintiff in error would be entitled to set up that decision and judgment as conclusive against defendants in error; and (b) whether, in aid of such right, plaintiff in error was entitled to have the suit against it in the state court stayed to await our decision in the suit between the States. In effect, the contention was that the original jurisdiction conferred by the Constitution upon this court in controversies between States was of such a nature as to render our decree made in a suit of that kind binding upon private parties asserting opposing claims to lands in the disputed territory, and to prevent such private parties from prosecuting their liti-

gation in a state court pending our determination of the suit between States. In setting up this contention plaintiff in error did no more than assert a title, right, privilege, or immunity under the Constitution of the United States. This, at most, afforded ground for an application to this court for a review of the resulting judgment by certiorari, but not for a writ of error. The case of *Cissna v. Tennessee*, 242 U. S. 195; 246 U. S. 289, 293, in which a similar question was raised but not passed upon, was brought to this court by writ of error, but before § 237, Judicial Code, was amended by the Act of 1916. The present writ of error must be dismissed.

On the eve of the argument a writ of certiorari was applied for; but as this was long after the expiration of the three months limited by § 6 of the Act of September 6, 1916, the application cannot be entertained, irrespective of whether the record shows a proper case for the allowance of that writ.

Writ of error dismissed.

Application for writ of certiorari denied.